No. 24966

In the

United States Court of Appeals

For the Ninth Circuit

SIERRA CLUB, a nonprofit California Corporation,

Appellee,

vs.

WALTER J. HICKEL, individually and as Secretary of the Interior, et al.,

Appellants.

On Appeal from the United States District Court for the Northern District of California

Brief for Appellee

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ISSUES PRESENTED

1. Whether the District Court abused its discretion by issuing a preliminary injunction to prevent the defendants from authorizing construction of a huge private resort in Sequoia National Game Refuge and an unnecessary road across Sequoia National Park which threatened irreparable harm before defendants' violations of law and abuses of discretion could be confirmed at a trial.

2. Whether the Sierra Club, as a prime spokesman of the public interest in conserving and protecting the natural resources of the Sierra Nevada Mountains, and the only entity likely to challenge the threatened illegal acts by federal officers, should be barred from asserting that interest by outmoded and inapplicable doctrines of judicial abstention.

STATEMENT

Since this matter is before the Court on an appeal from an interlocutory order, it is important to identify those assertions of fact which were before the District Court when it granted a preliminary injunction. That knowledge is most important on this appeal in which the briefs thus far filed advance new allegations of fact as though the appeal offered a second *de novo* opportunity to defeat the injunction.

The brief filed by appellants violates Federal Rule of Appellate Procedure 28 in failing to make reference to the record on appeal. We therefore cannot be sure that the record supports any of their allegations. We do know that, in many instances, allegations which are intended to have a subtle effect upon this Court's attitude toward the matter not only cannot be found in the record but are untrue.

The important facts are to be found summarized in the affidavit of J. Michael McCloskey, Executive Director of the Sierra Club found in the record at pages 65 through 80. Those most relevant on appeal are as follows:

1. Walt Disney Productions, Inc. seeks to develop a private resort in the Sequoia National Game Refuge area located within Sequoia National Forest and commonly known as Mineral King. (McCloskey affidavit Record page ("aff. R. P.") 67).

2. The Sierra Club is a non-profit California corporation with a national membership of approximately 78,000 persons, and with one of its principal purposes to conserve and protect the natural resources of the Sierra-Nevada Mountains. (Complaint R. pp. 1-2).

3. The Disney resort would be many times the size solicited by the Forest Service in February, 1965, with initial plans calling for Disney to spend 35 million dollars. Continued development *is promised* as use and economic return dictate. (McCloskey aff. R. p. 68) In addition to 20 ski lifts and accompanying manicured slopes, the resort is advertised as a "wonderland" whose supporting facilities would include major hotels and lodges, ten restaurants, a chapel, theatre, general store, five-story parking facility, hospital and sewage treatment facilities. (Disney information pamphlet, R. pp. 92-94) Other features will include power plants, swimming pools, a railway, avalanche dams, stream control devices and roads. These facilities and other such permanent facilities which are planned will be spread across 13,000 acres and construction and development will directly affect in excess of 300 acres of the Game Refuge. (McCloskey aff. R. p. 71)

4. Defendants Hardin, Deinema and James, purporting to act for the Department of Agriculture, Forest Service (hereinafter referred in their official capacities either as "Agriculture" or "Forest Service" and referred to summarily either as "defendants" or "appellants") threaten to authorize location of major permanent facilities without which the resort could not operate on acreage in excess of

80, though this is the limit of its term permit authority, by supplementing that permit with a so-called "revocable" permit. (McCloskey aff. R. p. 71)

5. The road which now extends 25 miles westward from Mineral King would not provide winter access or meet the traffic requirements for the projected patronage at the resort of 20,000 persons at one time. The State of California has sought not to improve the existing road but to construct a 25 million dollar high standard road on a new alignment to serve as a connecting link between the State highway system and the resort, cutting across approximately 9 miles of Sequoia National Park en route. Defendants HICKEL and MCLAUGHLIN, purporting to act for the Department of the Interior, National Park Service (hereinafter referred to in their official capacities either as "Interior" or "Park Service" and referred to summarily either as "defendants" or "appellants") have not found that such a road would benefit the Park or its recreational facilities or serve any other Park purpose. After resisting it for a long time, they have approved the proposal in principle, and threaten to issue a permit to the State. (Disney Information Pamphlet R. p. 94; Gilbert ltr. R. p. 181; McLaughlin aff. R. p. 251)

6. It is not necessary to cross the Park in providing surface access from the State highway system to Mineral King, but that route was decided upon by the State because apparently it is the cheapest. (Division of Highways Memorandum R. p. 107)

7. Without the approval of Congress, Interior proposes to authorize construction of a 66,000 volt power line across the Park to serve the resort. (McCloskey aff. R. p. 80)

8. It was not disputed in hearings before the District Court that Interior was about to approve the alignment of the road across the Park and that this would have eliminated the last hurdle to the letting of contracts by the State of

California and the commencement of work by Disney. This work would have produced irreparable harm within the Park and within the National Game Refuge. (Complaint R. pp. 1-10)

9. Forest Service approval of the Disney proposal was without the benefit of public hearings and without a finding that the proposed resort, planned on such a scale that it could handle 20,000 patrons at one time, would be consistent with the status of Mineral King as a Congressionally established National Game Refuge. (McCloskey aff. R. p. 70)

10. The record upon which the District Court acted included the allegation of only one injury to a party or any other federal governmental agency which might result from a preliminary injunction. That was the claim by a Forest Service representative that revenue might be lost if an injunction interfered with surveys and investigations. Indeed, that representative, in contending that the public interest would not be harmed by refusing to grant the injunction, speculated that "the 30-year term permit to Disney [would] not be issued by the Forest Service before approximately July 1, 1970." (Davis aff. R. pp. 237, 238) Planning, surveys and investigations were not enjoined. (District Court Order. R. pp. 317-318) It is the private developer which contends that "an injunction could force Disney to defer its schedule . . . resulting in substantial financial injury to Disney through additional administrative expenses, increased construction costs, reprogramming of personnel requirements, and disruption of corporate financial affairs." (Tatum aff. R. p. 248)

Many of the foregoing facts, and others alleged in briefs filed thus far, are contested and will be resolved only after discovery and a trial on the merits.

The following *erroneous* allegations of the briefs are not supported in the record:

1. "The Secretary of Agriculture proposes to issue a term permit to occupy about 60 acres for construction of motels, pools, and parking lots." (Appellants Brief, page 17, "A.B. page 17".) (This description in argument belies the facts. As noted above, Disney's own information pamphlet reveals that its Mineral King "wonderland" will include major hotels and lodges, ten restaurants, a theatre, general store, hospital, chapel, five-story parking facility, and sewage treatment facilities. R. pp. 92-94. These massive facilities which are only a part of Disney's proposed 35 million dollar private resort development are not revealed by appellants anywhere in their brief.)

2. Ski lifts are auxiliary facilities. (A.B. p. 3) (They are the heart of a ski resort. See page 36)

3. The road proposed to cross the Park merely will "improve an existing road." (A.B. p. 3) (The proposed road would cross the Park on an entirely new alignment. See page 41)

4. The road will "afford to the public better access to the recreational facilities." (A.B. p. 3) (There is evidence that the road answers no requirement of the National Park Service for better access. No evidence has been advanced that the road will serve a Park purpose. See page 41)

5. There are "dozens of recreational developments previously constructed under identical permits." (Tulare County Brief page 4—"T.B. p. 4") (Even if this allegation were supported, it would have no bearing on the judgment to be rendered in this and future cases. (See p. 16))

6. "Unless this case is decided on its merits there will be a cloud on 84 public recreation areas now operating on Mineral King-type permits." (T.B. p. 12) and "The District Court's holding invalidates the permits under which some

eighty-four ski resorts throughout the nation are presently operating." (United States Ski Association and Far West Ski Association Brief "S.A.B." p. 5) (For a variety of legal and practical reasons, this simply is not correct. (See pages 16-17))

7. There is "a reasonable basis for the skiing public's present concern" that the Sierra Club may not intend "to limit its application of the District Court's holding to Mineral King alone. (S.A.B. p. 3) (It is within the discretion of the Court to decide the application of its holding. The Sierra Club is of the opinion that the holding should not be applied to existing ski resorts. See page 17)

8. "Failure to dispose of this controversy swiftly and on its merits so that the Mineral King project might move toward completion would be a disaster for the people and the economy of the County of Tulare." (T.B. p. 8) (There has been no opportunity to test this bald assertion. Heavy construction work in the National Park and National Game Refuge before the case can be decided would have been a disaster for the people and economy of Tulare, the State and the Nation. See pages 13-16)

9. The Sierra Club practices a "single use (preservation) philosophy of public land management." (T.B. p. 10) (This erroneous, self-serving statement hardly qualifies as the sort of assistance to the court to be expected of *amicus curiae*. See p. 35)

SUMMARY OF ARGUMENT

Public lands of a National Park designated by Congress as so special in character that they should be conserved and left unimpaired for future generations are a subject of this case. Public lands designated as a refuge for game also are a subject, as are laws which clearly set limits on the authority of administrative agencies to permit commercial use and development of those lands.

At a trial on the merits, the Sierra Club will set forth the plan of the Forest Service to permit Disney to spread its huge resort across the Sequoia National Game Refuge and the plan of Interior to permit the State of California to cut construction expense by crossing 9 miles of Sequoia National Park with a high standard road from the State Highway system to a dead end at Mineral King.

The laws which set forth the limits of authority of the Forest Service and of the Secretary of the Interior unambiguously bar these plans.

The District Court soundly exercised its discretion in granting interlocutory protection so that the matter would not become moot before it could be decided on its merits. The court correctly recognized that while the public interest represented by the Sierra Club could disappear at any time with the liberal application of blasting powder, bulldozers and chain saws, no opposing interest would be irreparably harmed. It responded to the one concern presented to it by the opposition by expressly authorizing the planning activities which defendants asserted should not be interrupted.

The attempt of Mineral King's proponents to throw up the spectre of a threat to 84 other ski areas must fail. We are afforded no facts upon which to decide whether they present parallel situations. In addition, upon a finding that they would be affected, and if the public interest required it, the court could tailor its final order to operate only with respect to the matter before it and prospectively.

The limited review which is appropriate to this interlocutory appeal substantiates the trial court's exercise of its broad discretion. The merits of this case reveal several important instances of administrative lawlessness.

The Forest Service has Congressional authority to permit the term use of a maximum of 80 acres of public land

for private resort use. Its goal is to allow Disney to locate key facilities on more than 80 acres. The unlawful device chosen to get to this result was to supplement the permit for 80 acres with a so-called "revocable" permit, producing an illegal combination.

The acreage abuse applies to any Forest Service land. Disney's attempt to locate a "wonderland" at Mineral King also violated clear instructions of Congress that, in a National Game Refuge, both the animals and their habitat should be protected from inconsistent uses. The Forest Service has made no finding that bringing 20,000 people and all the recreational facilities they will demand into the tiny Mineral King Valley will be a consistent use. More important, any such finding would be so arbitrary and unreasonable as to be an abuse of discretion.

Interior's grudging acquiescence to construction of the highway by the State as a connecting link exceeds the limits of its power to manage the Park, as well as a clear Congressional injunction and its own administrative guideline, that it not permit the construction of roads which are connecting links. Interior also violated its own regulation calling for hearings in the case of important Park roads.

Appellants would prefer not to have this case decided on its merits. They have urged that the Sierra Club has no standing to appear as plaintiff, that the court below had no jurisdiction of the subject matter, and that the defendant government officials were cloaked with sovereign immunity. They are wrong on all counts.

The law of standing has been undergoing a major metamorphosis in recent years, particularly in the area in which government activity directly affects the general quality of life in America. Federal courts have assumed the responsibility of adjudicating cases which (under an earlier "abstentionist" philosophy) would have posed serious "standing"

problems. Major considerations in this development have been the desire to control administrative tyranny expressed in the Administrative Procedure Act and the recognition that the only effective force confining an official to the bounds of his statutory authority may be a lawsuit by a "private attorney general."

Appellants have cited many cases on the standing issue, but have failed to analyze those cases in the light of law's recent development and the policy considerations which have shaped the decisions. Properly understood, the weight of controlling precedent confirms the Sierra Club's standing to bring this suit.

Appellants' arguments on jurisdiction and sovereign immunity attack numerous straw men but cannot alter the fact that 28 USC § 1331 unquestionably gives the District Court subject matter jurisdiction and that this Court's decision in *State of Washington v. Udall* (No. 22413, Oct. 14, 1969) demolishes appellants' claim to sovereign immunity.

The extended length of this brief is caused largely by the attempts of *amici* as well as the defendants to drag in erroneous material not found in the record and strings of cases on extraneous points. Stripped to its essentials, it is a simple case of administrative excess correctly decided and should therefore be affirmed.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Granting Equitable Relief

The District Court did not abuse its discretion in granting a preliminary injunction for a combination of reasons: (1) As will be demonstrated, the Sierra Club raised serious questions concerning the legality of the threatened and already completed acts of Agriculture and Interior making those acts a fair ground for litigation and raising the likeli-

hood that it, as a representative of the public interest, would prevail; (2) interlocutory relief was necessary to prevent the irreparable harm to public lands which would have resulted from those acts before the questions could be resolved; (3) a balancing of interests showed that the parties opposing the injunction would not be irreparably harmed by its being granted pending a review on the merits of the serious issues which are presented; and (4) the public interest would not be harmed by the *limited* interlocutory relief which was granted.

A. THE GRAVE LEGAL ISSUES RAISED BY THE SIERRA CLUB AND THE LIKELIHOOD THAT IT WILL PREVAIL WARRANTED AND EVEN NECESSITATED THE GRANT OF A PRELIMINARY INJUNCTION.

As stated by Judge Franks in *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F.2d 738, 740 (2d Cir. 1953):

> "To justify a temporary injunction it is not necessary that the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt; if the other elements are present (i.e., the balance of hardships tips decidedly toward plaintiff), it will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberate investigation."

In the Ninth Circuit, the governing rule is that it is enough if the plaintiff has established a *possibility* that it will prevail on the merits. *Ross-Whitney Corp. v. Smith, Kline & French Laboratories,* 207 F.2d 190 (9th Cir. 1953).

Subsequent sections of this brief are concerned with the grave legal issues which were set forth preliminarily for the District Court. They demonstrate that all versions of the test have been satisfied and that interlocutory relief was essential.

B. AGRICULTURE AND INTERIOR THREATENED TO PERMIT IRREPARABLE HARM TO PUBLIC LANDS.

The unchallenged facts showed that before this matter could be decided on the merits Interior could have given final approval to the road which would have permitted the State of California to let contracts. This automatically would have triggered Forest Service issuance to Disney of the 30-year term permit together with its so-called "revocable" supplement. At this point, Disney would have been free to commence its work, including the "extensive bulldozing and blasting" referred to in its proposal. The damage which would have resulted to Sequoia National Park and to sub-alpine Mineral King before this case could have been decided on its merits would have been irreparable.

C. MAINTENANCE OF THE STATUS QUO DID NOT THREATEN IRREPARABLE HARM TO THE PARTIES ENJOINED.

The District Court balanced the interests which were presented to it on the record and found that no irreparable harm would result to parties opposing the injunction. At worst, delay was alleged to have an economic impact upon the parties. Failure to grant the injunction would have disregarded the overriding public interest in preventing destructive changes in the public lands of the Park and Game Refuge which could not be undone after a decision on the merits.

In balancing the interests, the District Court responded to the only concern advanced by a party, namely, that an interference with *planning* activities would result in delay and loss of revenue (Davis Aff. R. p. 238). The Court tailored its order so that only construction or physical disturbance of the terrain was enjoined. That order was not to "be deemed to preclude the conduct of investigations, planning, surveys and exploration in connection with the design of said development [and highway] . . ." (Order. R. pp. 317, 318).

Nothing in the record shows that planning is not proceeding as permitted by the order. If, as suggested by the Ski Associations it is not, the fault lies with neither the District Court nor the Sierra Club. Rather, it suggests either that the planning activities did not prove to be as essential as vigorously represented in argument and in the Davis affidavit or that the parties really agree with the District Court that the litigation has raised serious questions about the legality of the project and road, making it unwise to commit further time or resources to them.

D. THE PUBLIC INTEREST WAS SERVED, NOT HARMED, BY THE INJUNCTION.

In *Yakus v. United States,* 321 U.S. 414, 441 (1944), the Supreme Court re-affirmed the ". . . principle, declared in *Virginian R. Co. v. System Federation R. E. D.,* 300 U.S. 515, 552, 81 L. ed. 789, 802, 57 S. Ct. 592 that 'Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.' "

After citing and quoting *Yakus* and others, Professor Moore states:

> "The public interest is a factor to be considered. When an injunction is sought and the grant would aid the public interest the latter factor is highly relevant." (7 Moore, Federal Practice 1628-1629 (2d Ed. 1968).)

We agree. The overriding public interest lay in preventing what appeared to be illegal action which would have resulted in the permanent destruction of natural values of a National Park and a National Game Refuge. With the situation under control so that the issues would not become moot before they could be decided, that illegality could be confirmed.

1. Defendants Fail in Their Attempt to Mislabel the Interests Presented to the District Court.

Defendants assert that the District Court abused its discretion in examining the public interest because (1) the Sierra Club is a private corporation and, therefore, the interest it advances must be private, and (2) the agency authorizing development of the resort is public and therefore development must be in the public interest. This is pure sophistry.

First, the Sierra Club by its activities and conduct has exhibited a special interest in a matter of grave public concern—the protection of natural and scenic resources. The right of such an organization to act as a representative of the public, or a "private attorney-general", and to raise the types of issues involved in this case on behalf of the public has been confirmed repeatedly. *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2nd Cir. 1965) *cert. denied* 384 U.S. 941 (1966); *United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966); *Road Review League, Town of Bedford v. Boyd,* 270 F. Supp. 650 (S.D. N.Y. 1967).

Second, the project would *not* be public. It would be a private resort funded with private capital. The United States government would be involved only because it owns the land upon which the private developer seeks to locate the project. Appellant's statement that the resort would be "a major federal recreation project" amounts to a major misstatement of fact.

2. The District Court Considered All of the Interests Properly Before It.

The Tulare County brief seeks a reversal by the technique of advancing new allegations of interest for the first time on appeal, then saying that the trial court failed to consider them. Not only is this improper but it is an abuse of the *amicus* privilege which is based on the assumption that *amici* will seek to aid the court in resolving the

issues *properly before it.* The Sierra Club's fears expressed in opposing the *amicus* motion have been realized.

Obviously, there has been no opportunity to test the accuracy of the argument that the County will be adversely affected if the Disney resort is not constructed. If this were true, it would be an unfortunate by-product of the loss of a major private investment in the way that an area experiences an economic disappointment whenever any major investment, once a possibility, fails to materialize. The contention was not a proper subject of judicial notice for the trial court and it is no more so for this court.

Nothing in *Virginia Petroleum Jobbers Association v. FPC,* 259 F.2d 921 (D.C. Cir. 1958), or the preliminary injunction tests laid down in it can be interpreted as supporting the argument of Tulare County that, in the exercise of its discretion, the District Court was bound to give controlling weight to an interest not revealed on the record before it and, in any event, just one among the many interests in the Mineral King controversy, public and private, which may be identified.

The tests set forth in *Virginia Petroleum* arose out of a request by a petroleum marketer that the court *stay* proceedings of the Federal Power Commission involving a gas distributor and a pipeline company. Tulare erroneously attempts to extend the court's third test, namely, whether the issuance of a stay would substantially harm other parties interested in the proceedings, to include the alleged adverse effect of a preliminary injunction upon the County. The court in that case was not talking about interested persons in a general sense, but about persons upon whom the stay would operate, namely the distributor and the pipeline company. This is clear from the facts as well as from one of the two *injunction* cases cited as adopting the *Virginia Petroleum* test.

In *Erie-Lackawanna Railroad Company v. United States*, 259 F. Supp. 964, 971 (S.D. N.Y. 1966), *rev'd on other grounds* 386 U.S. 372 (1967), Judge Friendly, for a three judge court, recited the third test "in determining whether to stay the order of an administrative agency pending full review", as follows:

> "(3) Whether the issuance of a stay would substantially harm *the parties opposed* if they ultimately prevail," (Emphasis added)

To illustrate the fallacy of Tulare's contention, we need only look to other interests which might be asserted. The tremendous traffic attributable to the resort could produce smog and make Tulare County residents unhappy. That is a public interest. The diversion of 22 million dollars in State funds from their original dedication to Southern California freeways in order to pay for the road to Mineral King could leave Southern California motorists frustrated. That is a public interest. Cabin owners could lose their semi-wilderness and local packers could lose revenue presently received for guiding pack trips out of Mineral King if the resort were built. These are private interests. All of them may be legitimate. Without an opportunity to examine and cross-examine concerning them, we cannot be sure. In common with the interest now attributed to Tulare County, they are not a proper subject of judicial notice, can be found nowhere in the record, and are irrelevant on this appeal.

Having asserted that Tulare County is adversely affected by the preliminary injunction, the brief urges that the matter be decided on the merits. The trial court alone can resolve the outstanding factual issues and reach a result on the merits, but, assume for a moment that it finds that the proposed private resort and road are illegal. Will not the *real* public interest of Tulare County have been

served by preventing the irreparable despoliation to neighboring Sequoia National Park and Game Refuge before that decision can be reached?

3. This Litigation Was Not Intended to Threaten Other Resorts, and It Does Not, Either Legally or Practically.

Tulare County and the Ski Associations argue that the public interest is harmed by an alleged cloud cast over ski resorts on Forest Service lands which operate on a combination of term and revocable permits. In the first place, it is careless and unfair to say that such a cloud is cast before anyone has the opportunity to test the bare allegation that these are parallel situations.

We are unable to tell whether, in any of the 84 cases, substantial facilities are located on land covered by the revocable permit upon which the portion of the resort located on the term permit acreage is absolutely dependent. This is the vice of the Mineral King plan. It necessarily results in an illegal stretching of the term acreage well beyond 80. Moreover, whatever illegality may have attended a combination of permits at other ski resorts already has produced the irreparable harm Congress sought to prevent by the 80 acre limitation and there is no point in challenging their illegality at this late stage. This, of course, is why it was absolutely essential that destruction be enjoined *pendente lite* in this case. As Judge Doyle stated in *Parker v. United States, et al.,* (..... F. Supp. ..... (D. Colo. No. C-1368, 1969) unreported; attached to this brief as Appendix A);

> ". . . if the timber is sold, the question would suddenly become moot. The trees can, of course, always be cut down, but they cannot be restored if they have already been cut." (Appendix p. 6)

Finally, if, after a hearing on the merits, the trial court found that retroactive application of a decision would

threaten any other resorts and would have an oppressive effect or work hardship out of all proportion to the public purposes being achieved, the court could order that the decision operate only as to Mineral King and prospectively. *Safarik v. Udall,* 304 F.2d 944 D.C. Cir. (1962) *cert. denied* 371 U.S. 901 (1962)

Having asserted that the order of the District Court should be reversed because the administrative actions complained of are not reviewable, Tulare proceeds with a dissertation of socio-political factors which it interprets as calling for more ski resorts in California. Not only does such information not qualify Mineral King. It underlines Tulare's conception that an in depth judicial review of administrative action is desirable but only if the end result is confirmation of that action.

E. REVIEW OF THE INTERLOCUTORY ORDER BY THIS COURT SHOULD BE LIMITED.

The limited review available on appeal from this interlocutory order shows that the trial court did not abuse its discretion in granting a preliminary injunction. All that has been said and will be said in connection with this appeal must be governed by the standard to be applied in reviewing the grant of a preliminary injunction. This Circuit has adopted the statement of principle in *Love v. Atchison T. & S.F. Ry. Co.,* 185 F. 321, 331 (8th Cir. 1911) *cert. denied* 220 U.S. 618 (1911) as follows:

> "But the granting or withholding of an interlocutory injunction rests in the sound judicial discretion of the court of original jurisdiction, and where, as in the case in hand, that court has not departed from the equitable principles established for its guidance, its orders may not be reversed by the appellate court, without clear proof that it has abused its discretion.
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> ". . . An appeal from an order granting or refusing an interlocutory injunction does not invoke the judicial dis-

> cretion of the appellate court. The question is not whether or not that court in the exercise of its discretion would make or would have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law entrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?"
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> *Burton v. Matanuska Valley Lines,* 244 F.2d 647, 651 (9th Cir. 1957)

We submit that the proof shows the contrary; namely, that it would have been an abuse of discretion to fail to grant the injunction.

As stated in *Benson Hotel Corporation v. Woods,* 168 F.2d 694, 697 (8th Cir. 1948):

> "Ordinarily, the court in its discretion may grant a preliminary injunction where it appears that there is a substantial controversy between the parties and that one of them is committing an act or threatening the immediate commission of an act that will cause irreparable injury or destroy the status quo of the controversy before a full hearing can be had on the merits of the case, and generally such an injunction will be granted whenever necessary to the orderly administration of justice. (Citing cases)
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> " '. . . Ordinarily an appellate court, upon an appeal from an order granting or denying a temporary injunction, will not go into the merits of the case further than is necessary to determine whether the trial court exceeded a reasonable discretion in making the order, and *this is especially true where the rights of the parties can only or can better be determined upon full proof of the facts.*' " (Emphasis added)

Tulare County's reference to this court's admitted jurisdiction on an interlocutory appeal to make a final decision on the merits (for plaintiff as well as defendant—*Hurwitz*

v. Directors Guild of America, Inc., 364 F.2d 67 (2nd Cir. 1966) *cert. denied* 385 U.S. 971 (1966) does not modify the standard of review because it applies only when all the facts are clear and uncontested. In the leading United States Supreme Court case on this point, *Mast, Foos & Company v. Stover Manufacturing Company,* 177 U.S. 485, 495 (1900), the Court stated: "Ordinarily, if the case involves a question of fact . . . we think the parties are entitled to put in their evidence. . . ." And, as already described at pages 2-6, *supra,* and reflected throughout this argument, there are many contested issues of fact in this matter which must be resolved by the trial court.

II. The Record in the District Court Presented Threatened Acts of the Defendants Which Were Arbitrary and in Excess of Statutory Authority

A. THE CLOAK OF "DISCRETION" DOES NOT COVER ARBITRARY ACTS OR ACTS IN EXCESS OF STATUTORY AUTHORITY.

Management and control of the lands of the United States resides in Congress. It is true that Congress may delegate the power to manage the federal lands to the executive. It is *not* true that the executive may violate the limits of his power and seek to shield that violation from judicial scrutiny with the cloak of his "discretion". That is what this case is all about.

Appellants cite strings of cases for the proposition that the power of the Secretaries to administer federal lands carries with it the power to issue revocable permits. None of the cases cited supports this assertion, but if we were to assume it to be true, the power can't be abused to mock other unambiguous limitations upon their authority. The question always is—how much power has Congress granted?

The cases, including those cited in briefs filed by appellants and *amici,* individually and collectively, show what

the courts have done in harmonizing administrative discretion with the need to protect public and private interests against administrative lawlessness and unreasonableness. As a reading of those cases will show, the issue is not whether judicial review will be undertaken but, rather, its *extent.*

One instance in which the courts have attempted to limit their review is when Congress has granted broad authority to the administrative agency to decide whether to grant rights in public property. The courts have been loath to redecide the question of whether those rights should have been granted.

Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965) *cert. denied* 383 U.S. 912 (1966) illustrates this hesitancy. The case was concerned with the refusal of the Secretary of the Interior to lease certain lands in the Kenai National Moose Range in Alaska for oil and gas exploration. By the Mineral Leasing Act of 1920, Congress had made it discretionary with the Secretary whether he would lease lands believed to contain oil and gas deposits, but required that the first qualified applicant be the lessee of lands so leased. After plaintiff's application had been filed, the Secretary revised a regulation with the effect of prohibiting oil and gas leasing in wildlife refuges. The D.C. Circuit examined the laws and facts involved and decided that the Secretary had acted reasonably. It defined its scope of review as follows:

> "In a case like this the court does not seek to make a de novo determination. It suffices if there was reasonable basis for the executive department to reach its conclusion. Appellants have not made a tender sufficient to overcome the presumption of validity of administrative action. The court does not presume to substitute its discretion for that of the Secretary." (*Id.* at 752)

The court cited *Udall v. Tallman,* 380 U.S. 1, 4 (1965) which considered whether, in implementing the Mineral Leasing Act, the Secretary of the Interior could decide who first had filed a lease application. The Supreme Court examined both the laws and the administrative action before stating:

> "The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it. (Citing cases)"

United States v. Walker, 409 F.2d 477 (9th Cir. 1969) and *Ferry v. Udall,* 336 F.2d 706 (9th Cir. 1964) *cert. denied* 381 U.S. 904 (1965) involved statutes which gave the Secretary of the Interior absolute discretion as to whether certain public lands should be sold. The statutes contained no standard whatsoever to control the exercise of his discretion to sell or not to sell the land.

The courts in *Walker* and *Ferry* characterized such statutes as "permissive" and held that the Secretary's exercise of discretion under them was not subject to judicial review. Not only did the statutes in those cases provide no standard upon which effective judicial review could be based, but the facts as stated reflect the reasonableness of the decisions.

The statutes at issue here allow the exercise of discretion only within the clear limits set forth. They *do* contain standards such as the requirement that the Secretary of the Interior must act so as to "conform to the fundamental purpose of [the National P]arks." (16 U.S.C. § 1) The Secretary of Agriculture must not grant term permits for more than eighty acres (16 U.S.C. § 497) and cannot permit uses that are inconsistent with the purposes of game refuges. (16 U.S.C. § 688) Congress has supplied explicit standards to control the exercise of discretion and to per-

mit judicial review not only of acts which threaten to exceed the limits established but which are unreasonable in light of the clear purpose of the laws.

In *McMichael v. United States,* 355 F.2d 283 (9th Cir. 1965) the court found that the Secretary of Agriculture had not abused his discretion. It refused to further review the Secretary's choice of certain land for inclusion in a primitive area. Overruling plaintiff's contention, it found clear Congressional intent that recreational considerations should guide the Secretary in establishing a primitive area and that he had been so guided in making the choice.

Another sort of judicial hesitancy to overrule the executive comes when several constructions of Congressional intent are available and the administrative agency has selected one which is reasonable. This was the situation in *Udall v. Tallman,* 380 U.S. 1 (1965); *Canada Packers, Limited v. Atchison, Topeka and Santa Fe Railway Co.,* 385 U.S. 182 (1966); *Lucas v. American Code Co.,* 280 U.S. 445 (1930); *Thor-Westcliffe Development, Inc. v. Udall,* 314 F.2d 257 (D.C. Cir. 1963) *cert. denied* 373 U.S. 951 (1963); *California Company v. Udall,* 296 F.2d 384 (D.C. Cir. 1961) and *Sellas v. Kirk,* 200 F.2d 217 (9th Cir. 1952) *cert. denied* 345 U.S. 940 (1953).

Judicial hesitancy may be reinforced when Congress has had opportunities to correct the alleged administrative error and either has taken action amounting to an endorsement or has been silent. As we will see, Congress has been far from silent in respect to the kinds of approvals threatened by Agriculture and Interior.

An examination of the cases cited in the various briefs shows that they involved an ambiguous statute in which reference to what Congress had done or had not done furnished only secondary support for the court's own analysis. In addition, Congress could be found to have thought about

the problem. In every case, evidence of that fact in one of the following forms was present:

1. The administrative practice which was upheld had been disclosed to Congress repeatedly.

2. There was legislative history to show that Congress intended the statute to be construed in the exact manner being defended by the administrative agency.

3. Appropriations and authorizations by Congress were with respect to the very project under consideration in the case.

4. There was abundant legislative history and the only problem was to interpret that history.

Judicial reticence ends when, as threatened by Agriculture and Interior in this case, the executive attempts to exercise this authority outside the limits of an unambiguous Congressional limitation or, when operating within the limits of his discretion, he abuses it by acting arbitrarily or unreasonably.

Ickes v. Underwood, 141 F.2d 546, 548 (D.C. Cir. 1944) 323 U.S. 713 (1944) is cited prominently by appellants as illustrative of the extent to which administrative agencies should be free to exercise their discretion in federal land matters. It is an important case because it sets forth clearly the circumstances in which a court must intervene to review administrative action, including that involving land, as follows:

> "(1) Where an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government . . .; (2) where an officer attempts to enlarge his power, or to usurp power . . .; or (3) where his act is based upon a clear mistake of law . . .; (4) where the action of the officer or administrative body is clearly beyond its power and in violation of the statute . . .; (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner . . .;

> (6) where the act of the officer, 'under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority [and] he has no power at all to do the act complained of. . . .' " (141 F2d at 548)

The foregoing tests accurately describe the vice of the acts threatened by Agriculture and Interior.

As noted in *In re Hooper's Estate,* 359 F.2d 569, 575 fn. 7 (3rd Cir. 1966) *cert. denied* 385 U.S. 903 (1966), "administrative action is arbitrary if it is taken without any authority of law or upon a misconstruction of the statutory authority under which it purports to be taken."

Even when a court finds that the matter complained of *is* committed to agency discretion, such as is the case where Congress has given a Secretary the option to lease public land, judicial review of an abuse of that discretion is a matter of right. The extract from legislative history of the Administrative Procedure Act found in Appendix B makes this abundantely clear.

As stated by then Judge, now Chief Justice, Warren Burger in *Gonzalez v. Freeman,* 334 F.2d 570, 574-75 (D.C. Cir. 1964) in response to the contention by the Government that blacklisting was action committed to agency discretion:

> "Thus to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course there is no such *right;* but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts. An allegation of facts which reveal an absence of legal authority or basic fairness in the method of imposing debarment presents a justiciable controversy in our view."

The authorities cited by defendants do not govern the present situation because the only statutes which are relevant to their threatened acts set forth clear limits of permissible action and clear standards for the exercise of administrative discretion. They are permissive only within the clear limits set forth. The attempt of the defendants to exceed those limits is not reasonable and Congress has not ratified this unreasonableness either by action or inaction. Instead, these are instances of threatened action "in the teeth of the unambiguous mandate of the statute, contradictory of its plain terms, and amount to an attempt to legislate." *Helvering v. Sabine Transportation Co.,* 318 U.S. 306, 311-312 (1943)

B. THE PERMITS PROPOSED TO BE GRANTED BY THE FOREST SERVICE ARE IN VIOLATION OF LAW.

It is undisputed that the Forest Service intends to allow Disney to construct this massive development by employing the device of coupling a thirty-year eighty-acre "term" permit covering *many* of the resort's major facilities with an interrelated so-called "revocable" permit encompassing in excess of 10,000 acres for the rest. While we are not given a list of major facilities relying upon the "revocable" permit, we knew it would cover such vital facilities as ski lifts and runs, refuse and sewage disposal facilities, avalanche dams, roads and parking areas. Those resort facilities to be covered by the thirty-year eighty-acre term permit would be valueless without these others located outside the eighty-acre term limit.

1. Agriculture May Not Permit a Term Resort Use Involving the Location of Substantial Facilities on More Than 80 Acres of Public Land.

The Forest Service acknowledges that it relies solely upon 16 U.S.C. § 497 for its authority to grant the thirty-

year eighty-acre term permit. The pertinent portions of this section provide that:

> *"The Secretary of Agriculture is authorized* under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) *to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety;* . . ." March 4, 1915, c. 144, 38 Stat. 1101; July 28, 1956, c. 771, 70 Stat. 708. (Emphasis added)

The Sierra Club has never disputed the fact that 16 U.S.C. § 497 gives the Department of Agriculture the authority to grant thirty-year, eighty-acre term permits. However, in this case, the Forest Service, by the device of employing a supplemental permit, seeks to grant long term use of far more than eighty acres to Disney. The result is a violation of the eighty-acre limit specifically imposed by Congress on "resorts, and any other structures or *facilities* necessary or desirable for recreation" under 16 U.S.C. § 497. (Emphasis added)

The supplemental permit employed in an attempt to circumvent this limitation is a so-called "revocable" or "annual" permit whose statutory justification has been limited to that found in 16 U.S.C. § 551. That Section originally was enacted in 1897. It merely permits the Secretary of Agriculture to make rules and regulations governing the occupancy of National Forests. As relevant it reads:

> *"The Secretary of Agriculture* shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; *and he*

may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; . . ." (Emphasis added)

From its enactment in 1897, this section never has been relied upon to support the issuance of other than revocable permits. Specific Congressional authorization has been sought when use of a permanent or extended term has been desired. For example, the act of 1897 made an explicit provision to allow settlers residing within the boundaries of the National Forests to maintain schools and churches on a *permanent* basis. Each schoolhouse was granted two acres of land and each church one acre (16 U.S.C. § 479). Two years later, Congress specifically authorized the Secretary of the Interior (now Agriculture) to lease land for sanitariums and hotels at mineral springs on National Forest land for extended terms, 16 U.S.C. § 495.

Subsequently, when the Secretary of Agriculture concluded that term permits would be desirable for additional purposes, he sought Congressional authorization. In 1915 the first bill enabling the Secretary to issue term permits for recreational facilities was enacted. It authorized permits for terms up to thirty years for "summer homes, hotels, stores, or other structures needed for recreation or public convenience not exceeding a maximum of *five* acres." March 4, 1915, c. 144, 38 Stat. 1101. (Emphasis added) This was the original form of 16 U.S.C. § 497.

Other examples of the Secretary of Agriculture's acceptance of the principle that Congressional authorization is required before any type of long term use of National Forest land may be permitted, include the following:

1. The authority to grant rights-of-way for electrical plants, poles, and lines, 16 U.S.C. § 522 (1901);

2. The authority to permit the use of Forest Service structures or improvements of land by public and private agencies for periods up to 30 years, 16 U.S.C. § 580d (1950);

3. The authority to grant rights-of-way for communication lines and facilities, 16 U.S.C. § 523 (1952);

4. The authority to designate up to 640 acres of National Forest land for town sites, 16 U.S.C. § 478 (1958); and

5. The authority to grant easements for road rights-of-way over National Forest land, 16 U.S.C. § 532 through § 538 (1964).

The proposed "revocable" or "annual" permit sought for Disney's benefit at Mineral King is a completed version of the form specified for use by the Forest Service Manual (Section 2711.2-1). It is Form 2700-4. (R. p. 63) An examination of this form reveals that, though characterized as such by Agriculture, it is not an annual permit in any sense of that word. The length of its term is not mentioned. Rather, the Forest Service Manual itself (Section 2711.2-5, October 1968, Amendment No. 12) conceives of the duration as the time of "actual need". The only reference to "annual" is in provisions for payment (Section 1). Those provisions specify that payments are to be made annually and the permit clearly indicates its continuing nature in those words dealing with payment, namely, "and thereafter annually".

Nor is the "annual" permit revocable at the will of the Forest Service. The only provision found in the "annual" permit dealing with revocation is in Section 15. (R. p. 64) It refers to "termination". In the Forest Service Manual, termination pursuant to Section 15 is the equivalent of revocation. (F.S.M. 2716.3(2)) Section 15 states that "this permit may be terminated upon breach of any of the conditions herein or at the discretion of the Regional Forester or the Chief, Forest Service".

The rights of the permittee under an annual permit charged with a breach of condition are the same as in the case of a thirty-year permit. He is afforded an opportunity to cure after notice. (F.S.M. 2716.3)

"Discretion" as used in Section 15 is discretion in name only. That it is not absolute or uncontrolled is evidenced by the extensive appellate procedures established before *any* permits, including "annual" permits, can be finally revoked.

Under procedures established by the Secretary of Agriculture in 36 C.F.R. § 211.20 through § 211.119 Disney could appeal any revocation. Such an appeal tests the *grounds* upon which the permit was revoked. The existence of an appellate procedure means that the exercise of discretion must be a reasonable exercise. The destruction of a 35 million dollar investment would not be permitted at anyone's whim and caprice; certainly not by any court to whom Disney would ultimately have recourse.

From an economic standpoint, it is *inconceivable* that the Forest Service will, prior to the expiration of the thirty-year term, require Disney to remove ski lifts and other major facilities installed pursuant to the so-called "annual" or "revocable" portion of the grant, thus, effectively destroying the value of the facilities located on the land covered by the eighty-acre term permit. (The Sierra Club is unable to furnish the Court with a precise listing of facilities which were planned to be located on this land because the Forest Service has not revealed it.)

Without lifts, sewage disposal facilities, roads, avalanche dams and parking areas, all admittedly to be placed under a so-called "annual" or "revocable" permit, a ski resort cannot exist. Removal of these facilities would effectively destroy the entire 35 million dollar investment, including the value of those facilities "protected" by the thirty-year term permit.

Thus, this so-called "revocable" permit, when so inexorably tied by money, improvements and use to a thirty-year term permit, is in reality a thirty-year term permit. As a matter of fact it would never be revoked. As a matter of law, it takes on the character of a license coupled with an interest and thus is irrevocable for so long as the term use with which it is intertwined continues.

In short, as stated by the District Court:

> "It is inconceivable that Agriculture would, or could under the terms of the 'revocable' permit and the circumstances of its issuance, suddenly and 'at will' require the Developer to remove ski lifts, towers, refuse and sewage disposal, parking areas and roads covered by that permit and thus effectively destroy the 35 million dollar investment made by the Developer under his 30-year 80-acre term permit." (Memorandum of Opinion District Court, R. pp. 307-308)

Neither of the two Attorney General's opinions nor any of the four Comptroller General's opinions cited in appellants' brief on page 20, lend support to the Forest Service's attempt to employ the device of interrelated "revocable" and term permits at Mineral King to circumvent the eighty-acre limitation of 16 U.S.C. § 497.

35 Op. A.G. 485 (Nov. 27, 1928) is the only one of the six opinions which was presented to the court below. It authorized the Secretary of War to grant a permit to a railroad company to lay tracks across a portion of a military reservation in the absence of specific authorization from Congress, provided that license met the following three tests:

1. That it was expressly revocable at will;
2. That the permitted structures were capable of being removed without permanent damage to the land; and
3. That the granting of the permit would be a direct benefit to the United States.

The Sierra Club already has demonstrated that the proposed "revocable" permit to Disney cannot meet the first

test of the Attorney General's opinion because (i) the elaborate appellate procedures available to the licensee insulate the permit from revocation at will, and (ii) the interdependent nature of the term and "revocable" permits means that termination of the "revocable" permit would produce a simultaneous destruction of the economic value of the improvements located under the term permit. Nor can the proposed "revocable" permit meet the second test laid down in the Attorney General's opinion relied on by Agriculture. Once the blasting, grooming, and manicuring of slopes has been accomplished, once cement footings and foundations have been imbedded for ski lifts, and once sewage plants and avalanche dams have been constructed, the ecology of Mineral King will be altered for all time, and the land, as well as its marvelous flora and fauna, can never be returned to their present untramelled state.

34 Op. A.G. 320 (October 28, 1924), involved a request by the Secretary of the Navy to grant to private parties revocable licenses to use Government-owned patents. The then Attorney General, Harlan F. Stone, ruled that a non-transferable, non-exclusive, revocable license which gave the licensee no control, or vested interest in the patent, could be granted without specific Congressional authorization. This provides no comfort to appellants since Justice Stone distinguished cases in which the license authorized possession of tangible things or had the effect of diminishing the opportunity of others for use and possession.

The four opinions of the Comptroller General cited by appellants provide absolutely no assistance to them. In two of the four situations, the Comptroller General *rejected* agency attempts to grant rights in Government property. (14 Comp. Gen. 169 August 28, 1934 and 15 Comp. Gen. 96 August 5, 1935). In the third, a permit revocable at will was authorized which would result in no permanent im-

pairment of the land (22 Comp. Gen. 563 November 17, 1942); in the fourth, separate statutory authority was found (36 Comp. Gen. 561 February 4, 1957)

2. Legislative History Shows That Congress Meant What It Said in Limiting Resorts on Public Lands to 80 Acres.

The attempt of Agriculture to produce legislative history which shows a Congressional intention to permit interrelated permanent facilities such as ski lifts to be authorized by means of "supplemental" "revocable" permits is a failure. The matter of legislative intent was fully briefed and argued in the court below. (Sierra Club Reply Memorandum R. pp. 275-280 and Defendant Responding Memorandum R. pp. 287-291)

A brief review of that history shows that 16 U.S.C. § 497 is an amended version of a statute initially enacted in 1915 authorizing term permits up to five acres and thirty years for summer homes, hotels, stores and other structures needed for recreation or other public convenience.

The 1915 statute was sought by the then Secretary of Agriculture, D. F. Houston, to provide more certainty of tenure for those "who desire to construct more substantial improvements" and to reduce the "hesitancy" to "construct summer homes, residences, hotels, stores and other structures involving large expenditures". *1915 Congressional Record-House at 1787.*

Three important principles may be derived from the 1915 legislative history and statute:

(1) Prior to 1915, the Secretary of Agriculture had no authority to grant term permits for recreation purposes;

(2) Substantial capital expenditures called for some kind of certainty of tenure;

(3) The statute gave the Secretary the requisite authority to authorize the construction of homes, hotels, stores, *or structures* for terms up to 30 years, with the specific limitation of 5 acres.

The first increase in the five-acre term permit limitation was enacted by Congress in 1948. Its application was limited to the territory of Alaska (48 U.S.C. § 341).

The legislative history concerning the Alaska statute is interesting in respect to the communication of the then acting Secretary of Agriculture, Charles F. Brannan, to the House Agriculture Committee. Consistent with his predecessor, in 1915, Secretary Brannan favored legislation permitting term uses because uncertain tenure did not support "permanent structures and large capital investments". He found that while 5 acres was adequate for such purposes as a "summer home or a small resort", it was inadequate "for the increasingly common type of outdoor camp or lodge with associated dwelling units *and service facilities*" 1948 U.S. Code Cong. Service p. 1337. (Emphasis added)

Significantly, Secretary Brannan went on to say: "Winter sports facilities are often strung out, especially ski lifts, etc. and need elbow room." (*Id.* at 1338). Thus Brannan sought to have his authority expanded from 5 to 80 acres so that he might authorize *"service facilities"* within the 80 acres as well as winter sports facilities, such as "ski lifts". He thereby acknowledged and represented to Congress that such facilities must fall within the 80-acre limitation or be beyond authority to permit.

This brings us to the 1956 amendment to 16 U.S.C. § 497. The reasons advanced by the Secretary of Agriculture to Congress to expand his term permit authority to 80 acres throughout the United States were almost identical with those advanced in 1915 and again in 1948. Acting Secretary, True D. Morse, writing to the Chairman of the Senate Committee on Agriculture and Forestry on August 5, 1955, stated:

"Under existing laws this Department has adequate authority to issue revocable permits for uses for which long-term tenure is unnecessary or undesirable. . . .

"*The act of March 4, 1915, however, is inadequate* to meet other needs for term permits on the national forests *because it limits use and occupancy to* summer homes, hotels, stores, or other structures needed for recreation or public convenience, and the permit area *to a maximum of 5 acres.* It is frequently found that term permits would be desirable for uses not specified in the act of March 4, 1915, and *permittees often need more than 5 acres for their authorized operations.*

"*S. 2216 would meet needs to grant term permits up to 80 acres for* such public and semipublic uses as landing fields, resorts, campgrounds, picnic areas, organization camps and *ski lifts* and to industrial and commercial enterprises such as sawmills, mining camps, wharves, and warehouses, which would contribute to the general welfare and which could be located so as not to interfere with the proper utilization of national-forest resources." 1956 U.S. Code Cong. Service 3636. (Emphasis added)

In response, Congress not only raised the acreage limitation to 80, but, for the first time, specifically stated that this 80 acres, in addition to hotels, resorts and structures, was to include "any . . . *facilities* necessary or desirable for recreation, public convenience, or safety." (16 U.S.C. § 497)

Nothing has happened since 1956 which has brought to the attention of Congress any Forest Service practice of combining interdependent term and revocable permits.

Neither the Multiple-Use Sustained-Yield Act of June 12, 1960, 74 Stat. 215, 16 U.S.C. § 528-531 nor its legislative history affects the issues in this case. That Act expressly authorizes the use of National Forests for outdoor recreation range, and wild-life and fish purposes, in addition to the timber and watershed purposes authorized in the Act of June 4, 1897, 30 Stat. 34, 16 U.S.C. § 475.

The Sierra Club agrees that Congress seeks a balanced approach to the management of National Forest lands. It not only agrees, but, contrary to the baseless accusation by Tulare County, it urges that federal management be such that it reflect attention to all five management purposes identified in the Act by Congress.

Neither expressly nor by implication did the Act repeal the relevant limitations upon the power of Agriculture, or free it to do things formerly outside its authority. Obviously, while Agriculture may exercise its discretion and decide the proper balance of purposes to be served on any segment of the National Forest, it must do so with due regard to plain limitations imposed upon its authority by Congress.

In 1967, the Subcommittee on Forests of the House Committee of Agriculture conducted hearings on Management Policy and other Problems of National Forests. Those hearings do not support the argument that Congress ratified the type of development proposed for Mineral King.

The hearings were concerned with proposed House Bill HR. 4884. That Bill dealt with persons who had been issued either a term or revocable permit by the Secretary of Agriculture for National Forest land and who, pursuant to that permit, constructed any structure, fixture, or improvement on that land. It sought to afford them a possessory interest in the structure. The permittee would have all incidents of ownership, except legal title, which would vest in the United States. Further, that possessory interest could not be extinguished by either the expiration or termination of the permit and, accordingly, the structures could not be taken for public use without just compensation.

In response to this proposed Bill, the Associate Chief of the Forest Service, Mr. Arthur W. Greeley, appeared before the Subcommittee to explain the nature of Forest Service permits. He made it clear to Congress that it was the Department of Agriculture's position that the so-called

"revocable" or "terminable" permit was revocable at will, and that the Department was strongly opposed to enacting a law which would make it more difficult to revoke the "revocable" permit. He told Congress nothing which could have alerted it to the situation before this Court in which a so-called "revocable" permit is directly linked to, and interdependent with, a term permit.

Appellants and the Ski Associations simply misstate what Mr. Greeley told the Subcommittee in regard to approximately 53,000 special-use permits involving improvements estimated to exceed one billion dollars. He was not referring specifically to *revocable* permits but to all forms of special-use permits. He never stated how many of these 53,000 special-use permits were "revocable" permits or how many were term permits.

Appellants' characterization of ski lifts, runs, roads, avalanche dams, parking facilities, and refuse and sewage disposal facilities as service arms or auxiliary facilities is highly erroneous. To claim that ski lifts and runs are incidental to a ski resort is like claiming that a golf course is incidental to the clubhouse and locker-room. Nothing is more essential to a ski resort than lifts and runs. Without them, a ski resort becomes just a winter hotel with very few occupants. Most significant, however, is the fact that Congress has made clear its intention that "facilities" be located within 80 acres.

The inherent weakness of appellants' position is further demonstrated by their attempt to analogize ski lifts with power and communication lines. As we have shown, the Secretary of Agriculture historically has understood that he lacks the authority to grant revocable rights-of-way for power and communication lines and accordingly, has secured from Congress in 16 U.S.C. § 522 (1901) and 16 U.S.C. § 523 (1952) the specific authorization to permit the construction

and maintenance of such lines across National Forest land.

If ski runs and ski lifts are comparable with power lines, then the Secretary of Agriculture, by his own analysis, should obtain express Congressional authorization for the ski lifts and runs that are not to be placed under the eighty-acre term permit.

The case of *United States ex rel. TVA v. Welch,* 327 U.S. 546 (1946) contains nothing which can be read as condoning administrative reconstruction of an unambiguous limitation of power so that the limit is expanded beyond that set by Congress. *Polson Logging Co. v. United States,* 160 F.2d 712 (9th Cir. 1947) is in the same category.

Neither the legislative history nor the prior judicial decisions cited by the Ski Associations add any support to the position of Agriculture. Their only addition to appellants' "legislative history" is the claim that prior to the 1956 eighty-acre amendment, three ski resorts had been granted National Forest lands under both term and revocable permits. These grants purportedly were made to Lake Shore Resort at Huntington Lake in 1929, Mammoth Mountain in 1953, and White Pass in 1955.

Not a single piece of evidence is presented to show either the nature or the relationship of the term and revocable permits allegedly employed at these three resorts or that this information ever was brought to the attention of Congress.

The three cases cited by the Ski Associations also do not effect the issues before this Court. In *United States v. Mobley,* 46 F. Supp. 676 (S.D. Cal. 1942), the District Court merely upheld the right of the holder of a revocable permit for a summer resort of less than five acres to retain use of the permitted land against the attempted encroachment of mining interests. Nothing in the opinion indicates that the revocable permit there could not meet the tests set forth in the Attorney General's opinion, 35 Op. A.G. 485, supra. Nor is there any connection between *Mobley* and the interrelated

term and revocable permits proposed for the development of thousands of acres at Mineral King.

Brooks v. Dewar, 313 U.S. 354 (1941), allowed temporary permits to be granted under a grazing act. This certainly adds nothing to the legislative history of either 16 U.S.C. § 497 or 16 U.S.C. § 551, nor does it involve the coupling of permits which is so objectionable in this case. The Sierra Club has never disputed the power of the Department of Agriculture to issue truly revocable permits as defined in Attorney General's opinion 35, Op. A.G., 485 supra.

Finally, the case of *McMichael v. United States,* 355 F.2d 283 (9th Cir. 1965), sustained the Secretary of Agriculture's regulation prohibiting motorcycles in primitive areas of National Forests under the authority specifically granted to him over the National Forests in 16 U.S.C. § 551 "to make such rules and regulations . . . to regulate their occupancy and use and to preserve the forests thereon from destruction." *McMichael* concededly had nothing to do with special use permits and we fail to see how it can be viewed as a ratification of other actions taken by the Secretary of Agriculture purportedly under 16 U.S.C. § 551 which were not before the court or even discussed by it.

The legislative history of 16 U.S.C. § 497 supports and in fact underscores the point plaintiff has asserted throughout with respect to the proposed Disney project, namely, that the Secretary is without power by statute or otherwise to permit the term use of structures or facilities on more than eighty acres as he threatens to do.

Congressional silence since 1956 cannot be tortured into a ratification of an administrative practice not shown to have been brought to the attention of Congress. As stated in *Toucey v. New York Life Insurance Co.,* 314 U.S. 118, 140-141 (1941):

> "There is no occasion here to regard the silence of Congress as more commanding than its own plainly and unmistakably spoken words. This is not a situation where Congress has failed to act after having been requested to act or where the circumstances are such that Congress would ordinarily be expected to act . . . To find significance in Congressional nonaction under these circumstances is to find significance where there is none."

None of the briefs on file explain away the uncomplicated fact that Congress said "hold these developments to 80 acres." If Congress had been ready to see a resort spread across public land in excess of 80 acres, it would have been simple either to remove the acreage limitation or to set a higher limit.

As the District Court stated:

> "To hold otherwise [that there is no violation of the 80 acre limitation] would be to assume that the Congress, when enacting and amending this acreage limitation, contemplated that it could be circumvented, even nullified, by the device of coupling two different kinds of permits for a single, unified, private hotel-resort development, occupying more than 1,000 acres of a forest game refuge area. If Congress had any such situation in mind, it could have spared itself time and trouble by omitting any area limitation or by otherwise indicating its intent. Certainly Congress could not have been so naive as to think that 'revocable' permits, issued under such circumstances, would *really* be revocable." (Memorandum of Opinion, District Court, R. pp. 308-309)

C. DEFENDANTS HICKEL AND McLAUGHLIN LACK AUTHORITY TO PERMIT CONSTRUCTION OF THE PROPOSED ROAD ACROSS THE PARK.

1. Interior Is Powerless to Authorize a Road Which Has Not Been, and Cannot Be, Found to Serve a Park Purpose.

Neither in the District Court nor in their brief filed with this Court have the defendants produced a shred of support

for their contention that Interior possesses Congressional authority to permit the State of California to construct a high speed highway across Sequoia National Park. Such a grant would violate the Organic Act of the National Park Service of August 25, 1916, 39 Stat. 535, as amended, now 16 U.S.C. §1, because the Secretary of the Interior is authorized "to promote and regulate the use" of parks only

> ". . . by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which *purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment for future generations.*" 16 U.S.C. § 1 (Emphasis added)

The Secretary's general mandate to conserve the parks is applied through 16 U.S.C. §43 to Sequoia National Park as follows:

> "Sequoia National Park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the *preservation from injury of all timber, mineral deposits, natural curiosities or wonders* within said park, and their *retention in their natural condition* . . ." (Emphasis added)

We are told by this enabling legislation that the Secretary may authorize those things which conform with his fundamental management responsibility in connection with the Park, namely, conservation.

Though it is cited as authority, this enabling legislation furnishes no support for the assertion found in appellants' brief that "Congress has authorized the Secretary of the Interior . . . to cooperate with the Secretary of Agriculture in administering contiguous national forests." (A.B. p. 17).

Appellant avoids the problem created by the facts by changing them. It is true that there would be "no warrant for denying the Secretary of the Interior's power to authorize the improvement of an *existing* road through a national park," (emphasis added), unless that improvement served no Park purpose. Unfortunately, this provides no assistance in this case in which he intends to authorize a *new* road to be built and maintained by the State to connect the California Highway System with the Mineral King development, located outside the Park.

Understanding these facts, three things may be said. First, there is no authority for Interior to permit the State to build, own and operate any such road. Second, Interior has not found that the road would satisfy a Park purpose and, absent that, is without authority to approve any road. Third, any such finding would have amounted to an abuse of discretion because, as discovery will confirm, there *is* no Park purpose to be served by the road. The National Park Service has no plan to develop the portion of the Park touched by the road. It was third persons who pressured Secretary Udall to approve the road because, while the route across the Park was not the only available avenue, it was the cheapest means of providing access to Mineral King.

At a trial on the merits, the Sierra Club expects to prove that Secretary Udall and his subordinates fought long and hard against the road *because* it would not conserve scenery or natural and historic objects and wildlife, nor would it provide for their enjoyment in a manner "as will leave them unimpaired for the enjoyment of future generations." Rather, it would cut a new swath across the Park, including structures, cuts and fills.

Interior gets no help from the Attorney General's Opinions cited by defendants. Most heavily relied upon is 35 Ops. A.G. 485 (November 27, 1928) which sets forth the

three tests found at page 30 for the exercise of executive power to license use of public lands in the absence of specific statutory authority.

None of the tests would be satisfied by the illegal road. First, nothing in the record shows that the permit was intended to be revocable at will. Second, though it might be possible to remove highway structures previously installed, the damage to Park values resulting from cuts and fills and disturbance of the natural setting of *Sequoia gigantea* would be irreparable. Third, a detriment rather than a benefit accrues to the United States from a road across a national park which is not needed or even desirable for Park purposes.

The absence of power to do what is threatened is complete.

2. The Road Violates Interior's Own Administrative Guidelines and Therefore Is Illegal.

On April 11, 1968, the Secretary of the Interior implemented the recommendations of a special Park Road Standards Committee. These park road standards read in part as follow:

> ". . . Park roads are not continuations of the State and Federal network. *They should neither be designed —nor designated—to serve as connecting links. Motorists should not be routed through park roads to reach ultimate destinations.*
>
> Within parks, no road or other circulation system should be designed simply as a connecting device to link points of interest . . ."
>
> "*Approval of Design and Construction* To insure that all National Park roads, or other circulation systems, are in harmony with fundamental park purposes, the following considerations must precede approval of design and construction:
>
> "1. A professional ecological determination must be made that the resulting effects on park values—*includ-*

ing such aspects as wildlife habitat and mobility, drainage, stream flow, and climatic effects of paved areas—will be minimal." Park Road Standards, U.S. Department of the Interior, National Park Service, May, 1968. (Emphasis added)

The proposed road violates the standards in two critical respects. No ecological determination has been made that the effect of the road will be minimal. This determination could be made in the future. However, nothing can remove the more important objection, namely, that the road simply is a connecting link between destinations on either side of the park.

3. Congress Has Defined Interior's Road Building Power as Not Including Roads Which Are Connecting Links.

Evidence that Congress did not intend that the Secretary of the Interior have authority to construct roads is found in a 1962 report of the Committee of Interior and Insular Affairs dealing with the establishment of the Padre Island National Seashore. The House Report states as follows:

> "As introduced, the House bills required construction of a roadway the full length of the national seashore and roads beyond its northern and southern boundaries *to connect with* existing road systems from the mainland to the island. . . .
>
> The National Park Service already has authority to construct within any area which it administers such roads and trails as are needed for public use of the area (act of Apr. 9, 1924, 43 Stat. 90, 16 U.S.C. §8). *The committee is of the opinion that to require the National Park Service to construct a through highway for general public convenience in the Padre Island National Seashore would give it a function which does not properly belong to it* and also that, considering the narrowness of the island, such a roadway might well spoil the very assets which the creation of the national seashore is intended to preserve . . ." 1962 U.S. Code Cong. Serv. p. 2717. (Emphasis added)

4. The Secretary of the Interior Has Violated His Own Rules on Hearings.

On January 29, 1969, the Secretary of the Interior adopted and published regulations entitled "Roadbuilding in National Parks" (34 Fed. Reg. 19 (January 29, 1969)). These regulations, quoted in relevant part in Appendix B, call for both a corridor and a design public hearing in the case of "each major road project that would have a substantial social, economic, or environmental effect."

When the project involves improvement of an existing road, a single hearing is called for "if the project would have a substantial social, economic, or environmental effect.

As evidence of the intention to provide for the opportunity of the public to be heard at every important stage, the regulations go on to provide for an additional hearing in the situation in which an original location or design is altered.

The application of these rules to the proposed new high-volume road through Sequoia Park could hardly be clearer. Under them, the Secretary of the Interior would have had no choice but to grant a hearing on the proposed road prior to issuing a permit for its construction. It is an elementary principle of administrative law that an agency must comply with its own regulations, and that agency action taken in defiance of its own regulations is invalid without regard to the merits of the decision reached. *SEC. v. Chenery Corp.,* 318 US 80 (1942); cf. *Pacific Molasses Co. v. FTC,* 356 F.2d 386, 387, 389 (5th Cir. 1966).

But the Secretary of the Interior, on April 21, 1969, purportedly revoked the "Roadbuilding in National Parks" regulations, "effective immediately." His "revocation", as published in 34 Fed. Reg. 6985 (April 26, 1969) reads, in its entirety, as follows:

"Office of the Secretary

"ROADBUILDING IN NATIONAL PARKS

"Revocation of Procedures

"Notice is hereby given that the procedures adopted on January 18, 1969, and published in the FEDERAL REGISTER on January 29, 1969, 34 F.R. 1405, regarding the location and design of major road projects in the National Park System administered by the Department of the Interior are revoked, effective immediately.

"Issued in Washington, D.C. on April 21, 1969.

WALTER J. HICKEL,
Secretary of the Interior"

On April 26, 1969, defendant Hickel also issued a press release indicating that he was asking the National Park Service to revise its master planning procedures to provide for "broader public review and comment" on all phases of the National Park System, and not just roads. (McCloskey Aff. R. p. 117) The press release quotes defendant Hickel as having said:

> "Since the location and design of park roads is only one of several important factors in the planning process, it is not logical to single out the road construction aspect of planning for public discussion. All phases should be subject to comment from the public."

The Secretary's intention as stated is laudable. Unfortunately, in the case of this most controversial road serving as a connecting link to a huge private resort, he has announced no hearing and solicited no public comment. His course of action is not only arbitrary and capricious, but a direct violation of law.

By statutory definition, repealing a rule is just as much "rule-making" as formulating it in the first place. (5 U.S.C. § 551(5)). Secretary Hickel's "revocation" is completely inadequate and improper on numerous grounds.

1. It does not give notice of proposed rule-making as required by 5 U.S.C. § 553(b). See also *Pacific Coast European Conference v. United States,* 350 F.2d 197 (9th Cir. 1965);

2. It does not include any statement of the time, place, or nature of public rule-making proceedings as required by 5 U.S.C. §553(b) (1);

3. It does not make any reference to the legal authority under which the rule (revocation) is proposed, as required by 5 U.S.C. §533(b) (2);

4. It completely deprives interested persons of any opportunity to participate in the proposed rule-making in any way, shape or form, in violation of 5 U.S.C. §533(c).

Interior argues by footnote that the requirements of subsections (b) and (c) are not applicable to matters relating to public property and agency management. Those cases cited in support of the argument reveal that they have failed to see that while public property and management incidentally are involved, as they are in virtually everything undertaken by the Secretary of the Interior, the subjects of these regulations are *roads,* and the implementation of Interior's Congressional mandate to *conserve* the national parks. (16 U.S.C. § 1)

Accordingly, the purported "revocation" of the previous rule governing hearings on Park roads is invalid and ineffective. The previous rule remains in effect. The Secretary's failure to comply with his own regulation is a continuing violation of law, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law within the meaning of 5 U.S.C. §706(2).

D. HICKEL AND McLAUGHLIN ARE NOT AUTHORIZED TO PERMIT INSTALLATION OF A PRIVATE TRANSMISSION LINE ACROSS THE PARK.

Authority to construct a transmission line within the Park must come from Congress. The particular concern of

Congress that Sequoia National Park be protected against substantial man-made development is reflected in those laws enacted when it was enlarged to include the portion of the Park now threatened by the plans for a road and a transmission line. Section 45b, 16 U.S. Code reads, in part, as follows:

> "The said park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such reasonable rules and regulations, not inconsistent with the laws of the United States, as he may deem necessary or proper *for the care, protection, management, and improvement of the same,* such regulations being primarily aimed at the freest use of said park for recreation purposes by the public and *for the preservation from injury or spoliation of all timber, natural curiosities, or wonders within said park and their retention in their natural condition as far as practicable, and for the preservation of said park in a state of nature so far as is consistent with the purposes of section 45a-45e of this title.* . . . July 3, 1926, c. 744, § 2, 44 Stat. 820." (Emphasis added)

This section and those that precede it are directed at the Secretary of the Interior. Section 45c is no less directed to him. It reveals several manifestations of the intention of Congress that Interior's power be limited. After acknowledging the continuing rights of persons holding valid claims prior to July 3, 1926, it reads as follows:

> ". . . *Provided,* That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or lessee of land within the boundaries established by sections 45a-45e of this title to secure timber for use on and for the improvement of his land. . . . *Provided,* That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, trans-

> mission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress. July 3, 1926, c. 744, § 3, 44 Stat. 820.

Having described the responsibilities and limited powers of the Secretary, Congress by the last proviso clearly was directing the prohibition at him.

We are not in the unfortunate situation of having to glean the intentions of Congress from clouded versions of what motivated it to enact the law. Its language is unambiguous. It says that "no permit, license, lease, or authorization for . . . transmission lines . . . *or* for the development, transmission, or utilization of power within the limits of said park . . . shall be granted or made without specific authority of Congress." 16 U.S.C. § 45 (c). (Emphasis added) By this combination of words, Congress was prohibiting more than construction of hydroelectric power generation facilities and associated primary transmission lines within the limits of Sequoia National Park. If the interpretation suggested by Tulare County were correct, the phrase "transmission lines" could have been omitted and the same result achieved.

That Congress may have been concerned with preventing licensing of hydroelectric facilities in the Park does not exclude all its other concerns where they are manifest and the prohibition is explicit.

Congress further declared its intentions in the very next section, 45d, when it said.

> "No exclusive privilege shall be granted within said park, or on or over the roads and trails therein, except upon ground leased for the erection of buildings or camps thereon. July 3, 1926, c. 744, § 4, 44 Stat. 820."

We would be interested to know how to describe the Secretary's plan to authorize Southern California Edison to

locate the only transmission line which would serve Mineral King if it is not a threat to grant an exclusive privilege.

Regarding 16 U.S.C. § 5, it is sufficient to point out that § 45(c) is the specific and later enacted section which controls § 5, the general, earlier enacted section.

E. THE STATUTE CREATING THE SEQUOIA NATIONAL GAME REFUGE PRECLUDES A DISNEY-TYPE DEVELOPMENT AT MINERAL KING.

Disney seeks to inflict its resort "wonderland" upon public lands as to which Congress has enacted the following legislation:

> "[The lands] *are designated as the Sequoia National Game Refuge,* and the hunting, trapping, killing, or capturing of birds and game or other wild animals upon the lands of the United States within the limits of said area shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture: *Provided,* That it is *the purpose of this section to protect from trespass the public lands of the United States and the game animals which may be thereon,* and not to interfere with the operation of the local game laws as affecting private or State lands: *Provided further,* That the lands included in said game refuge shall continue to be parts of the Sequoia National Forest and nothing contained in this section shall prevent the Secretary of Agriculture from permitting other uses of said lands under and in conformity with the laws and rules and regulations applicable thereto *so far as may be consistent with the purposes for which said game refuge is established.* July 3, 1926, c. 744, § 6, 44 Stat. 821; June 25, 1948, c. 645, § 13, 62 Stat. 861." (16 U.S.C. § 688). (Emphasis added)

No federal official previously has sought to authorize a private construction project including ski lifts, manicured

slopes, hotels and lodges, 10 restaurants, a chapel, convenience specialty shops, conference center, swimming pools, theatre, general store, 5-story parking facility, hospital, sewage treatment plant, housing for 800 employees and 20,000 customers on a National Game Refuge. For that reason, the courts have not faced the question of whether, as a matter of law, such a use would be consistent with Game Refuge status.

California Fish and Game Commission personnel have stated "that in an extensive development such as the Disney proposal, considerable wildlife habit would be lost and wildlife would suffer from human encroachment." (McCloskey Aff. R. p. 119).

Perhaps most incredible of all is that there is no evidence of an attempt by the responsible agency to determine *whether or not* the proposed ski resort was a use inconsistent with the National Game Refuge. This failure to make a finding as to matters which by law should have been considered was arbitrary and capricious. See *Parker v. United States,* —— F.Supp. —— (D. Colo. No. C-1368, 1969) (unreported; attached to this brief as Appendix A) in which the court held that while the Forest Service has discretion to sell timber on Forest Service land, the Secretary of Agriculture

> "must give due consideration to the relative values of the various resources before making his decision, and there is no compromise with this requirement. It follows that *whether* the Secretary gave this consideration is a matter that the Court can review. (Citing authority) Agency action taken without fulfilling this mandate would be arbitrary and capricious, and, accordingly, reviewable under 5 U.S.C. § 706." (Emphasis added)

Tulare County's argument on the point only underscores the failure. When the deer population of the Refuge had in-

creased so that it was out of balance with the habitat, a *finding* was made by the Forest Service and National Park Service that this was the case and that particular steps would be taken to meet the threat to the purposes of the Game Refuge outlined by Congress.

If the responsible agency had found that Disney's "wonderland" was a use consistent with the purposes for which the Game Refuge was established, that finding would have been an abuse of discretion, and more than slightly embarrassing to articulate. As the legislative history quoted by Tulare (not to mention the plain meaning of the statute in referring to the purpose to protect the public lands of the Game Refuge from trespass) reveals, the concern of Congress was not only with protecting animals but with preserving their *habitat*. A trial on the merits will show that the migratory cycle of deer and other animals found in and around the Park includes Mineral King as the upper elevation terminus.

Commercial development on the scale threatened and 20,000 persons at one time are not responsive to a Congressional mandate to protect the land from trespass and maintain it as a *refuge* for game.

III. The Court Below Had Jurisdiction of the Case, and the Sierra Club Had Standing to Bring It.

In their eagerness to smother this case before its merits can be aired, appellants have urged a variety of theories for disposing of it summarily, at the threshhold. Their principal argument is that the Sierra Club lacks "standing". They also suggest that the court below lacked jurisdiction and that appellants are cloaked with "sovereign immunity".

We shall demonstrate that, under better-considered, recent "standing" cases the court below correctly found that the Sierra Club does have standing. The arguments that the court below lacked jurisdiction and that appellant gov-

ernment officials are protected from suit by the doctrine of sovereign immunity are frivolous.

A. THE SIERRA CLUB HAS STANDING TO SEEK JUDICIAL REVIEW OF APPELLANTS' UNLAWFUL ACTION.

Understandably, the Secretaries would rather not come to grips with the merits of this case. Any critical examination of their actions with regard to the Mineral King project reveals numerous instances in which they have gone beyond the outer limits of any discretion afforded them by statute. To prevent such critical examination, appellants propose to eliminate the critic. They urge that the Sierra Club has no right to point out the unlawfulness of their actions because, they say, the Sierra Club lacks "standing".

The "standing" issue was briefed and argued below. The District Court held that the Sierra Club had standing, citing four cases. *Scenic Hudson Preservation Conference v. FPC,* 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); *United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966); *Road Review League v. Boyd,* 270 F. Supp. 650, 661 (S.D.N.Y. 1967); *Powelton Civic Home Owners Association v. Department of HUD,* 284 F. Supp. 809, 825-828 (E.D. Pa. 1968). Appellants' approach to two of these four cases (*Road Review League v. Boyd, supra; Powelton v. HUD, supra*) throughout their long and turgid brief, has been simplicity itself: Ignore them. They are never mentioned.

Appellant officials have likewise ignored the principles with which the "standing" question must be answered and the trend of the law insofar as cases dealing with the "quality of our lives" are concerned. They ignore the fact (recognized repeatedly in decisions of the Supreme Court and of other circuits) that it is intolerable to permit members of the executive branch to violate the express will

of Congress so as to permanently and irreversibly degrade the quality of the public environment without fear of challenge. The rules of standing must not be construed to prevent such challenge.

Defendants concede, as they must, that the general policy of the law is to permit judicial review as a means of controlling unlawful administrative action. They concede that one may have standing to challenge unlawful administrative action as a result of a direct pecuniary harm resulting from that action.

Defendants also concede that persons without a direct pecuniary interest also have standing if there is a "persons aggrieved" section in the particular statute under which the federal official is supposed to operate, citing *Scenic Hudson v. FPC, supra; United Church of Christ v. FCC, supra.*

Defendants even concede that, absent either of the foregoing bases of standing, a person may have standing to challenge unlawful administrative action if it appears that the statute alleged to have been ignored by the federal official was intended to protect or benefit him or a class of which he is a member. *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1 (1968).

From this analysis, appellants conclude that the Sierra Club lacks standing here. They ignore several critical points:

1. If the Sierra Club has no standing to complain of the unlawful excesses of appellants, no one else will complain, and defendants are free to do what they wish, without regard to statutory limitations;

2. Properly construed, the Administrative Procedure Act *does* confer the right to seek judicial review upon the Sierra Club as representative of persons "adversely affected or aggrieved" by unlawful acts of appellants;

3. The statutes in issue here *were* intended to benefit the Sierra Club and its members by preventing commercial despoliation of the Sierra Nevada mountains;

4. Standing is a judge-made concept embodying a degree of flexibility which was properly employed in this case as it has been in other standing cases involving environmental issues which affect the quality of human life.

1. The Alternative to Judicial Review Is Administrative Tyranny.

Where a federal official has in fact acted in excess of his statutory authority, or contrary to it, there is only one effective remedy: A lawsuit. Since Congress has already expressed its will in the statute, and the officer has equally expressed his intention to disregard the will of Congress, the remedy (if there is to be one) must be in the courts.

A narrow interpretation of "standing" means that many types of lawless administrative action will remain beyond the reach of justice. Thus, the first and probably most important question in any "standing" case is whether a denial of standing will have the effect of making an administrator's action unreviewable.

These principles were recognized in *National Association of Security Dealers, Inc. v. SEC,* Civil No. 20164, D.C. Cir., July 1, 1969 (not yet reported). ICI, a trade association of investment counselors, sued the Comptroller of the Currency for a declaratory judgment regarding the power of national banks to operate a collective investment fund. The D.C. Circuit held that ICI had standing to sue.

Judge Bazelon's concurring opinion states:

> "The ICI presents a question of statutory construction to define the boundaries of official authority, a type of question well within the traditional competence of courts of law. It is the only party likely to assert the public interest in observance of the banking laws by the agency responsible for enforcing them. In the

> exceptional circumstances of this case, I would grant the ICI standing to vindicate the public interest despite the absence of a statutory aid to standing." (Footnote omitted).

Judge Burger, (Now Mr. Chief Justice Burger) reached the same result on standing because of the importance of the questions presented. Cf. *Puente de Reynosa, S.A. v. City of McAllen,* 357 F.2d 43, 46 (5th Cir. 1966). (Emphasis added)

Here, the question to be determined is especially important because, unless defendants' lawlessness can be curbed now, it can never be curbed at all. The proposed changes in topography and vegetation of the Mineral King area, to be achieved with blasting powder, bulldozers and chain saws, will be irreversible and irreparable for all the foreseeable future.

Moreover, the Sierra Club is the only actual (or indeed likely) spokesman for those people who would like to see Mineral King preserved. The loss suffered by other ski resort operators and the surrounding towns is likely to be diffuse and hard to estimate. It seems unlikely that any single municipality or enterprise adversely affected by the Mineral King proposal would feel sufficient interest to finance a lawsuit against these powerful and well-represented federal officials.

It seems particularly unlikely that the operator of any other ski resort built on federal land subject to ostensibly "revocable" land use permits issued by the Forest Service would be particularly interested in pointing out the fundamental illegality of Appellants' actions. To the contrary, operators of competing ski resorts may be expected to vigorously espouse the legality of the Mineral King permits, notwithstanding the competition which Mineral King will probably present to their own operations.

If the public interest is to have any meaningful representation in a decision which will have lasting and irreversible

consequences for the disposition of the public lands, then the Sierra Club, or some comparable organization, must have an opportunity to be heard.

The issue here is not a choice between the Sierra Club and a more appropriate plaintiff but between the Sierra Club and nobody. Cf. *Alderman v. United States,* 394 U.S. 165 (1969).

2. The Sierra Club's Standing Is Amply Supported by Persuasive Recent Cases Directly on Point.

Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966) held that non-profit conservationist groups had "standing" to challenge an order of the Federal Power Commission on the ground that the FPC acted improperly in approving the "Storm King" power project. The Court there held that ". . . those who by their activities and conduct have exhibited a special interest in . . ." the aesthetic, conservational, and recreational aspects of power development must be held to be included in the class of the "aggrieved" parties who have standing to protest the agency's action. (*Id.* at 616.)

In *United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966) the Court of Appeals reversed a decision of the FCC that the United Church of Christ lacked standing to protest renewal of a broadcaster's license. The United Church of Christ wished to assert that the broadcaster had not fairly balanced its presentation of controversial issues, especially those involving race. In a scholarly opinion by Judge Burger, the Court of Appeals reasoned that "unless the listeners — the broadcast customers — can be heard, there may be no one to bring programming deficiencies or offensive overcommercialization to the attention of the Commission in an effective manner." 359 F.2d at 1004-1005.

These cases, and the principle which they embody, were the subject of a provocative address by Robert W. Ginnane, General Counsel of the Interstate Commerce Commission, at the A.B.A.'s National Institute on Federal Agency Practice in April, 1967. His remarks are published in the A.B.A. Administrative Law Review (20 Admin. L. Rev. 149 (1969)) He says, inter alia:

> "I suggest that it is significant that both the *Scenic Hudson* and *United Church of Christ* decisions on standing arise in the area which we might characterize as involving the *quality of our lives* — the physical environment in which we live and the use made of *our* radio and television channels. As public agencies are established for the control of environmental damage in all of its forms, these two cases suggest that associations of citizens may have an even more lively future— to occasional discomfiture of regulatory agencies and of lawyers." 20 Admin. L. Rev. at 153-154

> "The rule, therefore, is that if the statutes involved in the controversy are concerned with the protection of natural, historic, and scenic resources, then a congressional intent exists to give standing to groups interested in these factors and who allege that these factors are not being properly considered by the agency." *Citizens Committee for the Hudson Valley v. Volpe,* 302 F. Supp. 1083, 1092 (S.D.N.Y. 1962) (footnote omitted) (appeal pending).

Other cases granting standing to conservationist groups to challenge destruction of man's natural environment include *Parker v. United States,* Civil No. C-1368, D. Colo., Dec. 24, 1969 (unreported; attached to this brief as Appendix A); *Road Review League v. Boyd,* 270 F.Supp. 650 (S.D.N.Y. 1968). Cf. *State of Washington Dept. of Game v. FPC,* 207 F.2d 391, 395 fn. 11 (9th Cir. 1953)

Congress enacted the legislation governing Sequoia National Park, National Parks generally, and the Sequoia

National Game Refuge out of consideration for the exact principles upon which the Sierra Club was founded and for which it now stands to fight. The Sierra Club speaks for the future generations for whose benefit Congress intended the fragile Sierra bowls and valleys to be preserved. It is exactly the sort of organization which was granted standing in the cases cited above.

B. APPELLANTS' ATTEMPTS TO DISTINGUISH THESE CASES REMAIN UNPERSUASIVE.

Appellant officials attempt to distinguish *Scenic Hudson* and *United Church of Christ* on the grounds that the statutes there in issue (Federal Power Act, Federal Communications Act, respectively) provided for review at the behest of a party "adversely affected or aggrieved." They argue that the statutes here involved contain no such provision for review and that those cases cannot, therefore, provide a basis for standing here.

1. The Administrative Procedure Act Supports Appellee's Standing.

The *Scenic Hudson* and *United Church of Christ* cases remain, however, fully applicable here. A person "adversely affected or aggrieved" by federal administrative action is also entitled to judicial review under the generally applicable provisions of the Administrative Procedure Act (5 U.S.C. § 551 et seq.).

Most recently, in a memorandum decision dated December 24, 1969, Judge Doyle of the District of Colorado sustained the standing of the Sierra Club and other persons interested in conservation to challenge the legality of a timber-cutting contract which the Secretary of Agriculture had authorized, in violation, plaintiffs contended, of the Multiple-Use Sustained-Yield Act, 16 U.S.C. § 528 et seq. *Parker v. United States,* Civil No. C-1368, D. Colo., Dec. 24, 1969 (see Appendix A).

In the *Parker* case, Judge Doyle expressly recognized that standing was predicated upon the Administrative Procedure Act and *not* upon any "persons aggrieved" provision of the Multiple-Use Sustained-Yield Act (which contains no such provision).

The Supreme Court in *Abbott Laboratories v. Gardner,* 387 U.S. 136, 140-141 (1967) analyzes the relevant language of the Administrative Procedure Act as follows:

> ". . . the Administrative Procedure Act, . . . embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute', 5 USC § 702, so long as no statute precludes such relief or the action is not one committed by law to agency discretion, 5 USC § 701 (a). The Administrative Procedure Act provides specifically not only for review of '[a]gency action made reviewable by statute' but also for review of 'final agency action for which there is no other adequate remedy in a court', 5 USC § 704. The legislative material elucidating that seminal act manifests a congressional intention that it cover a broad spectrum of administrative actions, and this Court has echoed that theme by noting that the Administrative Procedure Act's 'generous review provisions' must be given a 'hospitable' interpretation. (Citing cases) . . . only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review. See also Jaffe, Judicial Control of Administrative Action 336-359 (1965)." (Footnotes omitted.)

Many of the cases relied upon by defendants for the proposition that the Administrative Procedure Act does not confer "standing" predate *Abbott Laboratories* and can no longer be considered persuasive. The cases in this category include *Harrison-Halsted Community Group, Inc. v. HHFA,* 310 F.2d 99 (7th Cir. 1962), *cert. denied,* 373 U.S.

914 (1963); *Braude v. Wirtz,* 350 F.2d 702 (9th Cir. 1965); *REA v. Northern States Power Co.,* 373 F.2d 686 (8th Cir. 1967), *cert. denied,* 387 U.S. 945 (1967).

Of course, the APA is only available to review the activities of a Federal official. Accordingly, the provisions of the APA conferring standing would not be applicable in a suit against state or local governmental bodies or their officials. *Johnson v. Redevelopment Agency of the City of Oakland,* 317 F.2d 872 (9th Cir. 1963), *cert. denied,* 375 U.S. 915 (1963), is distinguishable on that ground, as well as on the ground that it predates *Abbott Laboratories* and other recent and important cases on standings such as *Jenkins v. McKeithen,* 395 U.S. 411 (1969); *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1 (1968); *Flast v. Cohen,* 392 U.S. 83 (1968).

Plaintiffs have been found to have standing to seek judicial review under the APA in a wide variety of cases in which the statute under which the federal officer or agency purported to act did *not* have a self-contained provision for administrative review. They include

> *National Association of Securities Dealers, Inc. v. SEC,* Civil No. 20164, D.C. Cir., July 1, 1969; *Saxon v. Georgia Association of Independent Insurance Agents, Inc.,* 399 F.2d 1010, 1017 (5th Cir. 1968); *Norwalk Core v. Norwalk Redevelopment Agency,* 395 F.2d 920, 933 fn. 26 (2d Cir. 1968; *Mulry v. Driver,* 366 F.2d 544 (9th Cir. 1966); *Citizens Committee for the Hudson Valley v. Volpe,* 302 F. Supp. 1083, 1090-1092 (S.D.N.Y. 1969); *Royalton College, Inc. v. Clark,* 295 F. Supp. 365, 369 (D. Vt. 1969); *Powelton Civil Home Owners Association v. Department of HUD,* 284 F.Supp. 809, 827-828 (E.D. Pa. 1968); *Road Review League v. Boyd,* 270 F.Supp. 650, 659-661 (S.D.N.Y. 1967); *American President Lines, Ltd. v. Federal Maritime Board,* 112 F. Supp. 346, 349 (D.D.C. 1953). See also *Nashville 1-40 Steering Committee v. Ellington,* 387 F.2d 179 (6th Cir. 1967), *cert. denied,* 390 U.S. 922 (1968).

The legislative history of the APA does *not* require the plaintiff to show an injury of the personal sort traditionally redressable by the courts. Nor does it require the plaintiff to point to a statute which either makes his particular grievance reviewable, or a statute of which he is an "intended beneficiary", to obtain judicial review. The House and Senate committees that reported on the APA evidenced a much more liberal intent. H.R. Report 1980, 79th Congress, 2nd Session, at page 42, says of these same provisions:

> "This section *confers* a right to review upon any person adversely affected *in fact* by agency action or aggrieved within the meaning of any statute. The phrase 'legal wrong' means such a wrong as is specified in § 10(e). It means that something more than mere adverse personal effect must be shown in order to prevail—that is, that the adverse effect must be an illegal effect. Almost any governmental action may adversely affect somebody—as where rates or prices are fixed—but a complainant, in order to prevail, must show that the action is contrary to law in either substance or procedure. The law so made *relevant* is not only constitutional law but any and all applicable law." (Emphasis supplied.)

Section 10(e) referred to above, is now 5 U.S.C. § 706. A "legal wrong", in the Committee's view, was agency action in excess of statutory authority, the very kind of illegal act the Secretaries of Agriculture and Interior were guilty of in this case, an act "contrary to law in either substance or procedure". And to the House Committee, if an agency violated a law by its actions, *that law* was a "relevant" law. There is no hint in the report that the APA's review provisions were concerned with the so-called "statutory aid" provisions found in the Federal Power Act, the Federal Communications Act and such other statutes as contain

their own provisions for review. Substantially the same explanation appears in Senate Report No. 752, 79th Congress, 1st Session at page 26.

C. CASES RELIED UPON BY APPELLANTS IN FACT SUPPORT THE SIERRA CLUB'S STANDING.

Appellant officials cite a number of cases in such a way as to make it appear that they favor appellants' position. In fact, the *holding* of many of those cases is diametrically opposed to appellants' position.

For example, in *Jenkins v. McKeithen,* 395 U.S. 411 (1969) the court *upheld* standing of a member of a labor union complaining about a state statute which created a labor-management commission to investigate alleged criminal violations in the field of labor-management relations. Mr. Justice Marshall's opinion representing himself, Chief Justice Warren and Mr. Justice Brennan contains certain language in which appellants take comfort, but the opinion is a minority opinion, and in any event (in view of the disposition of the case) dictum. As the dissenting opinion points out, the plaintiff in *Jenkins* in no way focused the challenged state statute upon his particular interest. He was appearing, quite clearly, as a "private attorney general".

In *Turner v. Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966) this Court concluded that the plaintiffs *had* standing, although it ruled against them on the merits.

In *Protestant and Other Americans, etc. v. Watson,* 407 F.2d 1264 (D.C. Cir. 1968), the District Court dismissed for lack of standing but the Court of Appeals reversed for further findings.

D. CASES CITED BY APPELLANTS ARE DISTINGUISHABLE ON NUMEROUS GROUNDS.

Other cases which appear to support appellants' position are distinguishable on a number of grounds.

1. "Competition" Cases Demonstrate a Conflicting Policy.

Many of the "no standing" cases are brought by businessmen facing unwanted and arguably unlawful competition. They commonly involve permission given by a government official which puts a new competitor of the plaintiff in business. These cases represent a clash between the strong national policy against lawless behavior by powerful public officials and the strong, if not stronger, national policy in favor of competition as a way of economic life.

Association of Data Processing Service Organizations, Inc. v. Camp, 406 F.2d 837 (8th Cir. 1969) (in which a decision of the U. S. Supreme Court is expected momentarily) purports to distinguish some of the cases upon which plaintiff here relies. Stripped of its rationalizations, the *Data Processing* case would seem to stand for the proposition that, in a free market economy, no one may be deemed "aggrieved" by having to face competition. This principle is certainly in full harmony with the basic principles of the federal antitrust laws.

Insofar as the *Data Processing* case deals with standing under the Administrative Procedure Act, its authority is suspect. In concluding that the plaintiff would not have standing under the APA, the Eighth Circuit relied upon its prior decision in *REA v. Northern States Power Co.,* 373 F.2d 686, 692-93 fn. 9 (8th Cir. 1967), decided *before Abbott v. Gardner,* 387 U.S. 136 (1967) and *Flast v. Cohen,* 392 U.S. 83 (1968). It is not in accord with the Supreme Court's injunction in *Abbott v. Gardner* that the Administrative Procedure Act be given a "hospitable reception". It is antithetical to the spirit of *Flast v. Cohen.*

Of course, the *Data Processing* case is now in limbo; the Supreme Court granted *certiorari* on June 23, 1969. (37 U.S.L. Week 3493). The case was argued on November 18, 1969 (BNA Antitrust & Trade Reg. Rep. No. 437, p.

A-1). There is certainly more than a possibility that it will be reversed. In terms of its result, the *Data Processing* case conflicts directly with *Wingate Corp. v. Industrial Nat. Bank,* 408 F.2d 1147 (1st Cir. 1969), *cert. pending.* If the *Data Processing* case is reversed, the decision will likely overrule a number of similar decisions relied upon by appellants.

The converse, however, is *not* true. Affirmance of the lower court's judgment in the *Data Processing* case would undoubtedly have significant repercussions in those cases in which the aggrieved party is aggrieved by being asked to face competition. But it should have little effect upon the distinguishable group of cases, such as the case at bar, in which a non-profit organization of public-spirited citizens attempts to prevent violations of statute which degrade the "quality of our lives".

Among the cases cited by appellants, many fall into the category of "competition" cases, distinguishable on the same grounds that distinguish the *Data Processing* case. They include: *Tennessee Electric Power Co. v. TVA,* 306 U.S. 118 (1939); *South Suburban Safeway Lines, Inc. v. The City of Chicago,* Civil No. 17179, 7th Cir., October 6, 1969 (not yet reported); *Troutman v. Shriver,* Civil No. 25539, 5th Cir., September 30, 1969 (not yet reported); *Arnold Tours, Inc. v. Camp,* 408 F.2d 1147 (1st Cir. 1969), *cert. pending,* 38 U.S.L. Week 3015; *Berry v. HHFA,* 340 F.2d 939 (2d Cir. 1965); *Duba v. Schuetzle,* 303 F.2d 570 (8th Cir. 1962).

2. Grounds for Judicial "Abstention" Are Greatly Narrowed by Recent Decisions.

The standing doctrine is but one of several methods which federal courts have employed to limit the types of cases which they will hear and decide. See *Poe v. Ullman,* 367 U.S. 497, 504 (1961). The concept of the "political question", a narrow interpretation of "case or controversy"

requirements of the Constitution, the doctrine of "sovereign immunity", and the "standing" doctrine all lead to the same result—refusal of a federal court to rule upon a legal question.

A very material readjustment of the scope of the abstention doctrine has taken place in just the last half-dozen years. In *Baker v. Carr,* 369 U.S. 186 (1962), the Supreme Court recognized the judiciary's obligation to reapportion state legislatures in spite of a long history of precedent which dismissed any such lawsuit as one involving a political question.

In *Flast v. Cohen,* 392 U.S. 83 (1968), the Supreme Court eviscerated *Frothingham v. Mellon,* 262 U.S. 447 (1923), a precedent of 45 years' standing, to allow the plaintiff standing to bring a lawsuit based upon the plaintiff's standing as a taxpayer. *Flast* in particular is a landmark case on standing in general. All earlier federal decisions taking a narrow view of standing must be re-examined in its light.

But *Flast* is no unique or accidental case. It clearly expresses present law of much broader application. It is important to note that the most recent Supreme Court case cited by appellants which actually decides a "general" standing issue adversely to the plaintiff is *Perkins v. Lukens Steel,* 310 U.S. 113 (1940). That case is older than the Administrative Procedure Act, and clearly superseded by that statute.

In *Joint Anti-Facist Refugee Committee v. McGrath,* 341 U.S. 123 (1951), the Court *upheld* standing, as it did also in *Jenkins v. McKeithen,* 395 U.S. 411 (1969) and in *Hardin v. Kentucky Utilities Co.,* 390 U.S. 1 (1968).

Poe v. Ullman, 367 U.S. 497 (1961) is not really a "standing" case, albeit the word is mentioned in the opinions. The majority predicated its opinion on the "unreality" of the plaintiffs' claim that they would likely be prosecuted under

Connecticut's anticontraception laws. Eight years later, in a strikingly similar case, the Supreme Court reached the opposite result. See *Jenkins v. McKeithen,* 395 U.S. 411 (1969).

3. There Is an Enormous Difference Between Administrative Action Which Is "Reversible" and Administrative Action Which, Once Completed, Cannot Be Undone.

Many of the cases cited by appellants involve administrative action which, should it later appear to be unlawful or even merely ill-advised, could be reversed and the status quo ante re-established.

Thus, a bank which has been permitted to go into the data processing business can later be told to get out of it. Compare *ADAPSO v. Camp,* 406 F.2d 837 (8th Cir. 1969) (*cert. granted* June 23, 1969). Or a bus system set up in error may be discontinued. Compare *South Suburban Safeway Lines, Inc. v. The City of Chicago,* Civil No. 17179, 7th Cir. October 6, 1969 (not yet reported). And so on.

4. Several of the Cases Relied Upon by Appellants Involve "Political Questions" and Are Distinguishable on That Ground.

Other cases cited by defendants in which the plaintiffs were found to lack standing were probably correctly decided, but are not applicable here. For instance, *Velvel v. Nixon,* 415 F.2d 236 (10th Cir. 1969) is clearly distinguishable on at least two grounds. There, a constitutional law professor in no danger of being drafted or shipped to Viet Nam attempted to challenge the President's right to prosecute the war in Viet Nam. He was held to lack standing. The case may be distinguished first on the ground that there are others (draftees) who are far more intimately affected by the Viet Nam war, and therefore more appropriate as plaintiffs. (Compare *United States v. Sisson,* 294 F.Supp. 511 (D. Mass. 1968)) and second on the ground that the Viet Nam war is essentially a political issue, amenable

to solution through the political process. Cf. *Baker v. Carr,* 369 U.S. 186 (1962).

This distinction also disposes of *Poe v. Ullman,* 367 U.S. 497 (1961); *Pauling v. McNamara,* 331 F.2d 796 (D.C. Cir. 1963), *cert. denied,* 377 U.S. 933 (1964) (nuclear testing); *Pauling v. McElroy,* 278 F.2d 252 (D.C. Cir. 1960), *cert. denied,* 364 U.S. 835 (1960) (nuclear testing).

5. Judicial Review of Immigration Cases Is Severely Restricted By Statute.

Aliens' rights and privileges under American law are substantially restricted. The restrictions include limited rights to judicial review of administrative action. See *Schilling v. Rogers,* 363 U.S. 666 (1960). Accordingly, appellants' reliance upon *Schilling,* and upon *Braude v. Wirtz,* 350 F.2d 702 (9th Cir. 1965) is misplaced. Cases involving the special rules of standing applicable to aliens have no application to the Sierra Club, a California corporation.

6. Standing Should Not Be Confused With Exhaustion of Administrative Remedies.

One of the fundamental rules of administrative law is that administrative remedies must be pursued and exhausted before judicial review is sought. *Johnson v. Redevelopment Agency,* 317 F.2d 872 (9th Cir. 1963), *cert. denied,* 375 U.S. 915 (1963), is a case in which this clearly was not done by the plaintiff. The result in the case is certainly justified on that ground, and that appears to have been the basis for the decision, despite the Court's use of the word "standing." In the case at bar, there can be no suggestion that the Sierra Club has failed to exhaust administrative remedies.

E. APPELLANT OFFICIALS ARE STRIPPED OF THE MANTLE OF SOVEREIGN IMMUNITY WHEN THEY EXCEED THEIR STATUTORY POWERS.

Appellants appear to argue that they may not be sued because neither the APA, the Mandamus Act, the federal question statute, nor the Declaratory Judgment Act waives sovereign immunity. The argument misses the mark entire-

ly. Appellants themselves waived sovereign immunity when they disregarded the sovereign's statute, and embarked upon a frolic of their own.

This court has recently had occasion to review the sovereign immunity doctrine in suits brought against the Secretary of the Interior based upon allegations that he had exceeded his authority in administering federal water laws. *State of Washington v. Udall,* Civil No. 22413, 9th Cir., October 14, 1969 (not yet reported); *Turner v. Kings River Conservation District,* 360 F.2d 184 (9th Cir. 1966).

In each, the defense of sovereign immunity was rejected. Each discussed in detail the cases of *Malone v. Bowdoin,* 369 U.S. 643 (1962), *Dugan v. Rank,* 372 U.S. 609 (1963) and *Larson v. Domestic and Foreign Commerce Corp.,* 337 U.S. 682 (1949) relied upon by appellants.

In *Washington v. Udall,* this Court said:

> "Judge Browning of our court, in a thorough study of the *Larson-Malone-Dugan* trilogy, has written that the language of the *Dugan* opinion refuted the possibility that *Larson* might stand for the broad proposition that sovereign immunity precluded all suits, although based on unconstitutional or ultra vires acts, for affirmative relief or for the disposition of property of the United States. *Turner v. Kings River Conservation Dist.,* 360 F.2d 184, 189-90 (9th Cir. 1966) . . . . We reaffirm our position in *Turner* that the *Larson* opinion was not intended to preclude, in the name of sovereign immunity, *all* suits for affirmative relief or for the recovery of property of the United States" (Slip opinion page 12)

Moreover, the Sierra Club is not contending that the defendants in this case have made mistakes in the administration of matters within the scope of their authority. The complaint is that they have acted in excess of their statutory limitations on their authority—the type of claim

which *Larson* expressly recognizes as properly brought against the responsible officers rather than the United States.

F. THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. § 1331.

Appellant officials' argument concerning the federal question statute, 28 U.S.C. § 1331 (Appellants' Opening Brief, pages 33-34) is obscure. If appellants contend that the federal question statute neither specifically waives the doctrine of sovereign immunity nor specifically expands existing concepts of standing to sue, the argument is superfluous; appellee has never argued to the contrary. If appellants contend that the federal question statute does not provide the district court with jurisdiction to determine this case, the argument is frivolous.

An action arises under the laws of the United States within the meaning of 28 U.S.C. § 1331 whenever it involves a substantial controversy with respect to the construction or effect of an act of Congress upon the determination of which the result depends. *South Side Theaters, Inc. v. United West Coast Theaters Corp.,* 178 F.2d 648 (9th Cir. 1949); *Gully v. First National Bank,* 299 U.S. 109, 114 (1936). This case involves actions by officers of the United States in excess of the authority delegated to them by statute; its disposition turns on the proper construction and interpretation of the statutes in question.

None of the cases cited by defendants refutes the proposition that 28 U.S.C. § 1331 grants jurisdiction in this case; for that matter none of the cases so cited is even relevant to the issue. The existence in this case of federal jurisdiction under 28 U.S.C. § 1331 is beyond serious dispute.

Since 28 U.S.C. § 1331 clearly confers jurisdiction in this case, it is not necessary to decide whether § 10 of the APA (5 U.S.C. §§ 701-704) also confers jurisdiction independ-

ently. There is highly persuasive authority, however, for the proposition that the APA *does* confer jurisdiction. See Byse and Fiocca, Mandamus and Venue Act, 81 Harv. L. Rev. 308, 330 (1967).

CONCLUSION

The foregoing analysis and the record on appeal make clear that the District Court acted reasonably in issuing a preliminary injunction to avoid irreparable harm to the public interest. The Sierra Club's standing to point out the violations of law and abuses of administrative discretion which are set forth is confirmed by the authorities and necessary to protect the public from the irreversible effects of administrative lawlessness. For these reasons, this court must affirm the order granting preliminary injunction.

Respectfully submitted,

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(Appendices follow)

Appendix A

In the United States District Court
for the District of Colorado

Civil Action No. C-1368

Robert W. Parker, Ellsworth P. Boyd, Roger C. Brown, Josef Staufer, William James Cunningham, John F. Donovan, Philip F. Krichbaum, Albert G. White, L. Steve Ruder, Richard Earl Peterson and William B. Mounsey, individually; Bruce Shelton Batting, individually and as Chairman, Eagles Nest Wilderness Committee; James Edmond Kemp, individually and as Vice Chairman, Eagles Nest Wilderness Committee; and Sierra Club and Eagles Nest Wilderness Committee, Colorado Open Space Coordinating Council, Inc.; Town of Vail, a Municipal Corporation; and Colorado Magazine, Inc.,

Plaintiffs,

vs.

United States of America; Clifford Hardin, individually and as Secretary of Agriculture of the United States; Edward P. Cliff, individually and as Chief, United States Forest Service; David S. Nordwall, individually and as Regional Forester; James O. Folkestad, individually and as Supervisor, White River National Forest, United States Department of Agriculture and Kaibab Industries, an Arizona Corporation,

Defendants.

MEMORANDUM OPINION AND ORDER

DOYLE, Judge

Plaintiffs bring this action seeking a declaratory judgment that a proposed sale of timber by defendants in the East Meadow Creek Area of White River National Forest, Colorado, is unlawful. They further seek to enjoin the named defendants from selling the timber until such time as certain required studies and investigations are made concerning the propriety of the timber sales and the applicability of the Wilderness Act, 16 U.S.C. § 1131 et seq., to East Meadow Creek.

East Meadow Creek is contiguous to the Gore Range Eagles Nest Primitive Area, both of which are located in White River National Forest. The United States Forest Service contracted with defendant Kaibab Industries for the sale to the latter of approximately 4.3 million board feet of timber located in the East Meadow Creek Area. Plaintiffs claim that the procedures required by the Multiple Use-Sustained Yield Act, 16 U.S.C. § 528 et seq. and the Wilderness Act, 16 U.S.C. § 1131 et seq. were not met, and hence the same is unlawful and should be enjoined.

Defendants United States of America and Kaibab Industries and the Intervenor, Western Wood Products Association, have moved for summary judgment on the grounds that: (1) the matter of timber sales is within the discretion of certain executive officers and hence is not subject to judicial review; (2) plaintiffs have no standing to challenge the proposed timber sale; (3) this is an unconsented suit against the government and hence barred by sovereign immunity; (4) an injunction would not serve to protect the area because mining claimants would still have the right to remove timber; and (5) there is no material issue of fact presented and defendants are entitled to prevail as a matter

of law. These issues have been briefed and argued and considered. We conclude that the motion for summary judgment must be denied.

Defendants raise two threshold contentions. First, that the plaintiffs have no standing to question either the decision or the procedures of the Forest Service since they would not be, according to the argument, aggrieved by an adverse decision. Second, defendants urge that this is an unconsented suit against the government and is thus barred by the doctrine of soverign immunity. Inasmuch as these are legal questions which, if decided adversely to plaintiffs would terminate the litigation, we are called upon to consider them before reaching the inquiry of whether there are genuine issues of fact to be tried.

As to the standing of the plaintiffs, we note that among the persons bringing this action are several residents and property owners in the nearby town of Vail, Colorado; a guide who conducts wilderness trips into East Meadow Creek; the Eagles Nest Wilderness Committee, Colorado Open Space Coordinating Council, the Sierra Club, conservation groups; the town of Vail; and Colorado Magazine. Under 5 U.S.C. § 702, any person "adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof." The Multiple Use-Sustained Yield Act, 16 U.S.C. § 528 and the Wilderness Act, 16 U.S.C. § 131, and the required procedures thereunder, were in part designed to protect the public interest in the preservation of the scenic and recreational aspects of certain public lands. It cannot be denied that plaintiffs are advancing the public interest; also they have special interest in the values which Congress sought to protect by enacting the above mentioned statutes. We conclude that these statutes confer on groups and individuals such as the plaintiffs the status of "aggrieved persons"

when the Secretary of Agriculture or the Forest Service fails to comply with the mandatory requirements of the Acts. *See, e.g., Scenic Hudson Preserv. Conf. v. FPC,* 354 F.2d 608 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); *Office of Communication of United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966); *Sierra Club v. Hickel,* No. 51464 (N.D. Cal., July 23, 1968).

We turn now to the argument that this is an unconsented suit against the government which is barred by the doctrine of sovereign immunity. The Supreme Court has recognized that the applicability of this doctrine is not dependent upon the denomination of the party defendant. *Larson v. Domestic & Foreign Commerce Corp.,* 337 U.S. 682 (1949). In the present case plaintiffs claim that the various named government officials have acted outside of and in excess of any statutory authority conferred upon them. Such a claim clearly takes this action outside the scope of sovereign immunity, for if the plaintiffs' claim proves true, the actions of the defendants must be considered individual rather than sovereign acts. *See, e.g., Larson v. Domestic & Foreign Commerce Corp., supra; Powelton v. Civic Home Owners Ass'n v. Department of Housing and Urban Development, supra; Abbott Laboratories v. Celebrezze,* 228 F. Supp. 855 (D. Del. 1964), *aff'd sub nom Abbott Laboratories v. Gardner,* 387 U.S. 681 (1967).

In addition, there are issues of fact to be tried. The first of these is whether the Secretary has given due consideration to the relative values of the various resources in particular areas as required by the statute, 16 U.S.C. § 529. It is true that neither the Mulptiple Use-Sustained Yield Act, 16 U.S.C. § 528 et seq. nor the Wilderness Act, 16 U.S.C. § 1131 et seq. expressly require judicial review. However, the Administrative Procedure Act, 5 U.S.C. § 702, does state:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

We cannot overlook 5 U.S.C. § 704. This provides:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.

Defendants contend that the foregoing provisions do not apply to this case because of the fact that the Administrative Procedure Act commits the present question to agency discretion. No doubt the decision to sell timber is in the discretion of the Forest Service. However, as indicated above, the Secretary must give due consideration to the relative values of the various resources before making his decision, and there is no compromise with this requirement. It follows that whether the Secretary gave this consideration is a matter that the Court can review. *See, e.g., Powelton Civic Home Owners Ass'n v. Department of Housing and Urban Development,* 284 F. Supp. 809, 819-20 (E.D. Pa. 1968). Agency action taken without fulfilling this mandate would be arbitrary and capricious, and, accordingly, reviewable under 5 U.S.C. § 706.

Still another issue of fact is whether the area here in question falls clearly within the definition of wilderness under the standards of 16 U.S.C. § 1131(c), and also whether it is ecologically interrelated with the primitive area. If it does satisfy these standards, the Secretary would have no discretion but would have to report to the President as to the suitability of these contiguous areas for wilderness classification. Accordingly, this case cannot be disposed of without furnishing to the plaintiffs an opportunity to establish that the areas in question are so clearly wilderness

in character as to require action by the Secretary in respect to them.

Finally, as to the question whether the present efforts of the plaintiffs to obtain prior relief are appropriate, suffice it to say that if the timber is sold the question would suddenly become moot. The trees can, of course, always be cut down, but they cannot be restored if they have already been cut. We conclude that the plaintiffs are entitled to an opportunity to present their evidence as to the character of this area, its interrelationship with the neighboring primitive area, and its suitability as a wilderness wthin the definition of the statute, 16 U.S.C. § 1131(c).

The motons of the defendants should be and the same are hereby denied.

DATED at Denver, Colorado, this 24th day of December, A.D. 1969.

By the Court:
/s/ William E. Doyle
William E. Doyle, Judge
United States District Court

Filed Dec. 24, 1969
G. Walter Bowman, Clerk

Appendix B

In addition to the statutes quoted in the appendix to the brief filed by appellants, the following statutes and regulations are relevant to the issues presented on appeal:

The Administrative Procedure Act, 5 U.S.C. §§ 551-706 reads in relevant part as follows:

§ 553.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief state-

ment of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

* * *

§ 702.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 703.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 704

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 392.

§ 705.

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings. Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 393.

§ 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. Pub.L 89-554, Sept. 6, 1966, 80 Stat. 393.

Relevant Congressional debate on the scope of review under the Administrative Procedure Act is found in the Legislative History of the Administrative Procedure Act, Senate Doc.No. 248, 79th Cong., 2d Sess. 310-11 (1946) as follows:

Mr. Donnell. [Senator from Missouri.] I should like to ask the distinguished Senator a question. * * *

It has occurred to me that the contention might be made by someone in undertaking to analyze this measure that in any case in which discretion is committed to an agency, there can be no Judicial Review of action taken by the agency. The point to which I request the Senator to direct his attention is this:

In a case in which a person interested asserts that, although, the agency does have a discretion vested in it by law, nevertheless there has been abuse of that discretion, is there any intention on the part of the framers of this bill to preclude a person who claims abuse of discretion from the right to have Judicial Review of the action so taken by the agency?

Mr. McCarran. [Senator from Nevada.] Mr. President, let me say in answer to the able Senator that the thought uppermost in presenting this bill is that where an agency without authority or by caprice makes the decision, then it is subject to review.

* * *

Mr. Donnell. But the mere fact that a statute may vest discretion in an agency is not intended, by this bill, to preclude a party in interest from having a review in the event he claims that there has been an abuse of that discretion. Is that correct?

Mr. McCarran. It must not be an arbitrary discretion. It must be a Judicial discretion; it must be a discretion based on sound reasoning.

Mr. Donnell. I thank the Senator.

The Organic Act of the National Park Service, 16 U.S.C. § 5, reads in relevant part as follows:

> The head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights-of-way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for communication purposes, and for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to the extent of two hundred feet on each side of the center line of such lines and poles and not to exceed four

hundred feet by four hundred feet for radio, television, and other forms of communication transmitting, relay, and receiving structures and facilities, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right-of-way herein granted for any one or more of the purposes herein named: *Provided,* That such right-of-way shall be allowed within or through any national park or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all or any part of such right-of-way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there has been issued a permit, prior to March 4, 1911, for any of the purposes specified herein under any law existing at that date, may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations making application under the provisions of this section subsequent to said date. Mar. 4, 1911, c. 238, 36 Stat. 1253; May 27, 1952, c. 338, 66 Stat. 95.

The Sequoia National Park Acts, 16 U.S.C. 41, 43, 45a-45e, 57, 58, 60-65, 78, 79, read in relevant part as follows:

§ 43.

Sequoia National Park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber,

mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition. He may, in his discretion, grant leases for building purposes for terms not exceeding twenty years of small parcels of ground not exceeding five acres, at such places in said park as shall require the erection of buildings for the accommodation of visitors. He shall provide against the wanton destruction of the fish and game found within said park, and against their capture or destruction, for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same to be removed therefrom, and, generally, shall be authorized to take all such measures as shall be necessary or proper to fully carry out the objects and purposes of this section and section 41 of this title. Sept. 25, 1890, c. 926, § 2, 26 Stat. 478; Aug. 25, 1916, c. 408, § 3, 39 Stat. 535.

§ 45b.

The said park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such reasonable rules and regulations, not inconsistent with the laws of the United States, as he may deem necessary or proper for the care, protection, management, and improvement of the same, such regulations being primarily aimed at the freest use of said park for recreation purposes by the public and for the preservation from injury or spoliation of all timber, natural curiosities, or wonders within said park and their retention in their natural condition as far as practicable, and for the preservation of said park in a state of nature so far as is consistent with the purposes of sections 45a-45e of this title. Such rules and regulations shall permit the taking of fish by hook and line from the streams or lakes in said park, but at such seasons, during such times, and in such manner as may be directed by the Secretary of the Interior. Such rules and regulations, however, shall provide against the destruction

of the wild life within said park, and the Secretary of the Interior is authorized to take all such measures as shall be necessary to fully carry out the objects and purposes of said sections. Said Secretary may, in his discretion, execute leases to parcels of ground not exceeding ten acres in extent at any one place to any one person or persons or company for not to exceed twenty years, when such ground is necessary for the erection of buildings, for the accommodation of visitors. Such leases or privileges may be renewed or extended at the expiration of the terms thereof: *Provided,* That existing leases from the Department of Agriculture may be continued, in the discretion of the Secretary of the Interior, for so long as such extension is not detrimental to the public purposes for which the park is created. July 3, 1926, c. 744, § 2, 44 Stat. 820.

§ 45c.

Nothing contained in section 45a or 45b of this title shall affect any valid existing claim, location, or entry established prior to July 3, 1926, under the land laws of the United States, whether for homestead, mineral, right-of-way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: *Provided,* That under rules and regulations to be prescribed by him the Secretary of the Interior may issue permits to any bona fide claimant, entryman, landowner, or lessee of land within the boundaries established by sections 45a-45e of this title to secure timber for use on and for the improvement of his land; and he shall also have authority to issue, under rules and regulations to be prescribed by him, grazing permits and authorize the grazing of livestock on the lands within said park at fees not to exceed those charged by the Forest Service on adjacent areas, so long as such timber cutting and grazing are not detrimental to the primary purpose for which such park is created:

Provided, That no permit, license, lease, or authorization for dams, conduits, reservoirs, power houses, transmission lines, or other works for storage or carriage of water, or for the development, transmission, or utilization of power within the limits of said park as constituted by said sections, shall be granted or made without specific authority of Congress. July 3, 1926, c. 744, § 3, 44 Stat. 820.

§ 45d.

No exclusive privilege shall be granted within said park, or on or over the roads and trails therein, except upon ground leased for the erection of buildings or camps thereon. July 3, 1926, c. 744 § 4, 44 Stat. 820.

The Secretary of the Interior's Rules for Roadbuilding in National Parks, F.R. Doc. 69-1177; Filed Jan. 28, 1969, read in relevant part as follows:

Office of the Secretary

ROADBUILDING IN NATIONAL PARKS

Adoption of Procedures

The procedures adopted herein are designed to ensure effective public participation in determining the location and design of major road projects in the National Park System administered by the Department of Interior. In addition, they require that full consideration be given to the potential social, economic, and environmental effects of each proposed project.

The following procedures are adopted, effective immediately, and apply to all major road projects in the National Park System administered by the Department of Interior.

(1) Coordination required. When the National Park Service begins considering the development or improvement of a major road it shall solicit the views of

those Federal, State, and local agencies that it believes might be interested or affected by the development or improvement. A mailing list will be maintained upon which any such agency may enroll, upon request, to receive notice of projects in any area specified by that agency.

(2) Public hearings required. a. Both a corridor public hearing and a design public hearing will be held, or an opportunity afforded for those hearings, with respect to each major road project that:

(1) Is on a new location; or

(2) Would have a substantial social, economic, or environmental effect.

b. A single combined corridor and design public hearing will be held, or the opportunity for such a hearing afforded, on all other projects before a location is approved, except as provided in subparagraph 2.c below.

c. Hearings are not held on a project that is solely for such improvement as resurfacing, widening existing lanes, adding auxiliary lanes, replacing existing grade separation structures, and installing traffic control devices or similar improvements, if the project would not have a substantial social, economic, or environmental effect.

d. An opportunity for another public hearing will be afforded in any case where proposed locations or designs are so changed from those presented, in the notices specified below or at a public hearing, as to have a substantially different social, economic, or environmental effect.

* * *

(7) Definitions. a. A "corridor public hearing" is a public hearing that:

(1) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the need for and the general location of, a major road; and

(2) Provides a public forum that affords a full opportunity for presenting views on each of the proposed alternative locations, and the social, economic, and environmental effects of those alternate locations.

b. A "design public hearing" is a public hearing that:

(1) Is held after the major road location has been approved, but before design approval;

(2) Is held to ensure that an opportunity is afforded for effective participation by interested persons in the process of determining the specific location and major design features of a major road; and

(3) Provides a public forum that affords a full opportunity for presenting views on alternative design features, including the social, economic, environmental, and other effects of alternate designs.

c. "Social, economic, and environmental effects" means the direct and indirect benefits or losses such as:

(1) Public health, safety and welfare.

(2) Conservation, including erosion, sedimentation, wildlife and general ecology of the area.

(3) Use of recreational areas and parks.

(4) Natural and historic landmarks.

(5) Aesthetics.

(6) Noise, and air and water pollution.

(7) Fire protection.

(8) Fast, safe, and efficient transportation.

(9) Engineering, right-of-way, and construction costs of the project and related facilities.

(10) Maintenance and operating costs of the project and related facilities.

(11) Operation and use of existing road facilities and other transportation facilities during construction and after completion.

d. "Major roads" means the main entrance roads and arteries of the park circulation system.

This list of effects is not meant to be exclusive, nor does it mean that each effect considered will be given

equal weight in making a determination upon a particular major road location or design.

Issued in Washington, D.C., on January 18, 1960.

STEWART L. UDALL,
Secretary of Interior

The Secretary of Agriculture's authority to grant term permits, 16 U.S.C. § 497, read when it was enacted in 1915 as follows:

> "That hereafter the Secretary of Agriculture may, upon such terms as he may deem proper, for periods not exceeding thirty years, permit responsible persons or associations to use and occupy suitable spaces or portions of ground in the national forests for the construction of summer homes, hotels, stores, or other structures needed for recreation or public convenience, not exceeding five acres to any one person or association, but this shall not be construed to interfere with the right to enter homesteads upon agricultural lands in national forests as now provided by law." March 4, 1915, c. 144, 38 Stat. 1101.

Present 16 U.S.C. § 497 reads as follows:

> The Secretary of Agriculture is authorized, under such regulations as he may make and upon such terms and conditions as he may deem proper, (a) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining hotels, resorts, and any other structures or facilities necessary or desirable for recreation, public convenience, or safety; (b) to permit the use and occupancy of suitable areas of land within the national forests, not exceeding five acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining summer homes and stores; (c) to permit the use and occupancy of suitable areas of land within the national forest, not

exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining buildings, structures, and facilities for industrial or commercial purposes whenever such use is related to or consistent with other uses on the national forests; (d) to permit any State or political subdivision thereof, or any public or nonprofit agency, to use and occupy suitable areas of land within the national forests not exceeding eighty acres and for periods not exceeding thirty years, for the purpose of constructing or maintaining any buildings, structures, or facilities necessary or desirable for education or for any public use or in connection with any public activity. The authority provided by this section shall be exercised in such manner as not to preclude the general public from full enjoyment of the natural, scenic, recreational, and other aspects of the national forests. Mar. 4, 1915, c. 144, 38 Stat. 1101; July 28, 1956, c. 771, 70 Stat. 708.

The Organic Administrative Act, 16 U.S.C. § 551 reads in relevant part as follows:

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471 of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of sections 473-482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regula-

tions may be tried and sentenced by any United States commissioner specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b)-(e) of Title 18. As amended Oct. 23, 1962, Pub.L. 87-869, § 6, 76 Stat. 1157; Aug. 31, 1964, Pub.L. 88-537, 78 Stat. 745.

Federal question jurisdiction is granted in 28 U.S.C. § 1331 which reads as follows:

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.